No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

GARRET W. McENERNEY,
Attorney for Plaintiff in Error.

JOHN J. BARRETT,
ANDREW F. BURKE,
Of Counsel.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

INDEX.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST, *Plaintiffs in Error,* vs. TAGGART ASTON, *Defendant in Error.*	No. 2672

BRIEF OF PLAINTIFFS IN ERROR.

I.

Statement of Case.

This is an action at law for libel. The defendant in error, whom, for purposes of convenience, we shall hereafter call the plaintiff, had judgment in the trial court, and from that judgment this writ of error is prosecuted. The alleged libel which is the basis of the action was contained in an article which appeared in an edition of the San Francisco Examiner published in Washington, D. C., on December 2, 1913. The corporation defendant is the publisher of the newspaper in which the article was published. The individual defendant was sued upon the theory expressed in the complaint that he was the "Managing Editor in charge

of'' the publication,[1] a fact as to which there is no evidence in the record, as we shall hereafter point out.

At the time of the publication of the Washington edition of the San Francisco Examiner, containing the alleged libelous article, there was pending before the United States Senate the application of the municipality of San Francisco for certain rights in the Hetch Hetchy Valley in California in connection with a municipal water supply. The plaintiff and others were actively resisting the grant of these rights. By letters and telegrams to members of Congress they were insisting that San Francisco had shown bad faith in its application for the Hetch Hetchy privileges; that it had available other adequate sources of water supply, and that it had suppressed engineering reports and data which showed that the rights sought by San Francisco were not necessary.[2] The plaintiff was particularly active in endeavoring to thwart the efforts of San Francisco to obtain the privileges which it was seeking. Associated with the plaintiff in this behalf was one Eugene J. Sullivan, president of the Sierra Blue Lakes Water & Power Company, a corporation which claimed to own certain water rights on the Mokelumne River in California, which were said to be available and adequate as a source of water supply for San Francisco. The said Sierra Blue Lakes Water & Power Company, through Sullivan, waged an active campaign in Congress to prevent San Francisco from acquiring the privileges which it sought in the Hetch Hetchy Valley, influenced

[1] R., p. 55.
[2] R., pp. 116, 118, 120, 121, 122, 129, 130, 132.

in this attitude as we claim, largely if not solely, by the circumstance that it felt that San Francisco would be compelled to acquire its properties if the Hetch Hetchy privileges sought by San Francisco from Congress were denied her.

In oral testimony and in written declarations to Congress Sullivan had stated that the plaintiff was the engineer of the Sierra Blue Lakes Water & Power Company.[3] In letters and telegrams to members of Congress the plaintiff had made the same statements.[4]

The City of San Francisco relied very strongly upon a report made by a Board of Army Engineers appointed at the behest of the Secretary of the Interior of the United States, to make an investigation of the sources of water supply available for San Francisco as a basis of determining whether or not the Hetch Hetchy privileges should be granted. The plaintiff and Sullivan contended that the Board of Army Engineers had been deceived in its findings through the fact that the City of San Francisco, upon which had been enjoined the duty of supplying data to the Board of Army Engineers, had not only been remiss in this duty, but had actually suppressed a report compiled by an Assistant City Engineer named Bartell,[5] which, according to the claim of the plaintiff and Sullivan proved that the Mokelumne water rights owned by the Sierra Blue Lakes Water & Power Company were ample as a source of water supply for San Francisco. The charge was made by the plaintiff and Sullivan that the city

---

[3] R., pp. 116, 122, 139.
[4] R., pp. 116, 120, 122-123, 130.
[5] R., pp. 116, 117.

officials, particularly those in charge of the City Engineers' office in San Francisco, had deliberately suppressed this report.[6]

While the bill granting the Hetch Hetchy privileges sought by San Francisco was pending in the Senate, the Examiner Printing Company published at Washington a special edition of the San Francisco Examiner dealing with the water supply question in San Francisco and the needs and necessities of San Francisco in that behalf and urging the granting of the Hetch Hetchy privileges. Among the articles was one as follows:[7]

> "Inspiration of Opposition.
>
> "During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the City of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.
>
> "But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted received information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston" (R., p. 114).

(The Johnson referred to was a conservationist who was opposing the bill.)

On another page of the paper was a signed article by Representative Kent of California, who stated that:[8]

---

[6] R., pp. 118, 126.
[7] R., p. 114.
[8] R., p. 113.

> "I want to state here and now that I have read this literature put out by these people * * *
>
> It has only one foundation in fact and that foundation is the letters of this man Sullivan, whom we proved in the hearings in the House to be a thief and a man who ought to be in the penitentiary" (R., p. 113).

These foregoing articles are the basis of the libel counted on in the action.

The innuendos in the complaint fix the sting of the libel as an imputation that the plaintiff was the "tool, sycophant or hireling of a thief" and of "a man who ought to be in the penitentiary",[9] and was associated with such a man in a conspiracy to defraud the City of San Francisco, and pursuant to that conspiracy had made gross and careless aspersions upon public officials. The plaintiff especially excepted to the use of the term "Sullivan's man" as though the term "man" was one of particular opprobrium, indicating that the plaintiff was a mere tool of Sullivan, engaged with him in a nefarious enterprise. The defendant William Randolph Hearst denied in his answer any participation in the publication.[10] The answer of his co-defendant Examiner Printing Company contained a plea of justification as well as one of mitigation. It was claimed by the Examiner Printing Company that Aston was an associate of Sullivan and was in the employ of the Sierra Blue Lakes Water & Power Company, and that nothing more was meant by the use of the term, "Sullivan's man Aston" than to indicate the

---

[9] R., p. 21.
[10] R., p. 61.

fact that Aston was in the employ of Sullivan's Company. It was also alleged that Sullivan and the company of which he was president were endeavoring to sell their water rights to the City of San Francisco, and because of that fact were endeavoring to prevent San Francisco from acquiring the Hetch Hetchy privileges which, if acquired, would have rendered impossible a sale of the properties of the Sierra Blue Lakes Water & Power Company. It was alleged that the claims and representations of this company as to its water rights were so utterly disproportionate to the facts that the assertion of such claims and representations constituted an *objective* fraud.

We need not concern ourselves with the plea of mitigation for the reason that on the issue of malice in the publication as to which alone it was pertinent, the finding of the jury was in favor of the defendants.

After a trial lasting more than two weeks the jury returned a verdict in favor of the plaintiff in the sum of twenty-eight hundred dollars ($2800) as *compensatory* damages.[11] No award of *exemplary* damages was made, the jury thus by implication finding that the publication had not been inspired or actuated by malice.

No exception is taken to the instructions in the case nor will we question the sufficiency of the evidence to support the verdict. We do not by this mean to concede that the plaintiff was entitled to judgment in any amount. On the contrary we claim that the evidence was such as to warrant a verdict in favor of the defend-

[11] R., p. 80.

ants and insist that but for the erroneous reception of certain evidence such verdict would probably have been rendered. We recognize, however, the futility of insisting upon a claim of insufficiency of evidence in the face of a conflict in the evidence. We shall hereafter, therefore, confine ourselves to a discussion of the errors which we claim the court committed in the reception of evidence. We believe that the minds of the jury were distracted by immaterial evidence of a prejudicial character erroneously admitted by the trial court. We believe that but for this prejudicial evidence erroneously admitted the verdict of the jury would have been in favor of the defendants. Therefore while we do not claim that the evidence was insufficient to support the verdict, we do insist that the verdict was largely influenced, if not in fact brought about, by the reception of such immaterial and prejudicial testimony.

As before stated the claim of the plaintiff was that he had been libelled in three particulars. A previous article having stated that Sullivan was a "thief" and a "man who ought to be in the penitentiary", the plaintiff alleged that he was libelled in the article complained of, (a) in being referred to as "Sullivan's man"; (b) in the assertion that the "Sullivan-Aston scheme" was a "gross fraud"; and (c) in the charge that he in the furtherance of said scheme had made "gross and careless aspersions" on public officials. The alleged "Sullivan-Aston scheme" of course was the effort to sell the properties of the Sierra Blue Lakes Water and Power Company to San Francisco and the effort of the promoters of that scheme to defeat the Hetch Hetchy privi-

leges, the granting of which would render the sale impossible. It was a scheme to sell the properties of the Sierra Blue Lakes Water and Power Company that was claimed to be a "gross fraud". In the furtherance of that scheme it was said in the article complained of that the plaintiff and Sullivan had made "gross and careless aspersions" upon city officials, the Board of Army Engineers and engineers generally, particularly in charging that the city engineer of San Francisco had deliberately suppressed a report favorable to the properties of the Sierra Blue Lakes Water and Power Company.

The plaintiff's efforts therefore legitimately should have been directed to proof of the falsity of the charges (a) that the plaintiff was "Sullivan's man"; (b) that the "Sullivan-Aston scheme" was a "gross fraud"; and (c) that the plaintiff had made "gross and careless aspersions" upon city officials.

On the other hand the efforts of the defendant Examiner Printing Company under its plea of justification should have been directed to proof of the facts (a) that the plaintiff was an associate or employee of Sullivan or of the Sierra Blue Lakes Water and Power Company and was therefore "Sullivan's man"; (b) that the plaintiff and Sullivan were engaged in a scheme to thwart the efforts of San Francisco to obtain Hetch Hetchy privileges and thereby to compel San Francisco to purchase the properties of the Sierra Blue Lakes Water and Power Company, which scheme was a "gross fraud"; and (c) that in the furtherance of this scheme the plaintiff had carelessly made grave

charges of suppression of evidence against city officials, particularly against the city engineer of San Francisco without investigation and without foundation.

The issues, therefore, were well defined. The defendant Examiner Printing Company upon its part endeavored to show, and we claim succeeded in showing, by the testimony of Sullivan[12] and of the plaintiff himself,[13] that the plaintiff was in the employ of Sullivan and of his company and was therefore an associate of Sullivan, and in this sense at least was "Sullivan's man". This, it may be again remarked, was the only sense in which, according to the claim of the defendant, the term "Sullivan's man" was used in the article complained of. On the other issues the defendant offered evidence to show that Sullivan was actively engaged in promoting the sale of the properties of the Sierra Blue Lakes Water and Power Company to San Francisco;[14] that to accomplish said sale it was necessary that the privileges in the Hetch Hetchy Valley sought by San Francisco, be denied her, and that accordingly Sullivan was doing his utmost to defeat the granting of those privileges.[15] This was the so-called "Sullivan-Aston scheme". For proof of the fraudulent character of the scheme the defendant Examiner Printing Company relied upon the circumstance that the representations of the Sierra Blue Lakes Water and Power Company and of Sullivan were greatly exaggerated, the values

---

[12] R., pp. 116, 122, 139.
[13] R., pp. 116, 120, 122-123, 130.
[14] R. pp. 155, 156.
[15] R., pp. 155, 156.

of the properties inflated,[16] and further that the difference between the represented and the actual values of the properties of the Sierra Blue Lakes Water and Power Company was so great[17] as to constitute the claim of Sullivan and of the company with respect to those properties *objectively* a "gross fraud". The plaintiff on the other hand claimed that he was not and never had been in the employ of Sullivan or of Sullivan's company.[18] The plaintiff further testified that he never had been engaged in any scheme to sell the properties of the Blue Lakes Water and Power Company to San Francisco,[19] and that the charge of "gross fraud" made with respect to such a scheme was unjustified as to him because he had never been engaged in it.

It was the claim of the plaintiff, which he endeavored to sustain by evidence, that his sole connection with the properties of the Sierra Blue Lakes Water and Power Company was as an engineer representing European capitalists whom he was endeavoring to persuade to purchase the properties in connection with a hydro-electric and irrigation project (R. p. 242). It appeared in the evidence, however, that the European capitalists whom the plaintiff was endeavoring to interest in the properties were interested in them solely because they believed that the properties could be sold

---

[16] Plaintiff and Sullivan claim that Sierra Blue Lakes Water and Power Company could from its properties economically develop a supply of 350,000,000 gallons of water per day (R., p. 120). As against this, Mr. Grunsky's estimate was 60,000,000 gallons per day (R., p. 238). The Board of Army Engineers estimated it at 128,000,000 gallons per day (R., p. 272).

[17] The properties were offered to San Francisco for $6,000,000 but were offered to private individuals for $1,500,000 (R., p. 269).

[18] R., p. 174.

[19] R., pp. 242-243.

to San Francisco as a source of municipal water supply. The letters between these persons and the plaintiff through the intermediary of a Mr. Wilsey of Portland show conclusively that they were interested in the properties solely as a source of municipal water supply for San Francisco, and that they were continually inquiring about the possibility of a sale of the properties to San Francisco, and as bearing upon that question the possibility of Congress granting to San Francisco the Hetch Hetchy rights, which would defeat such a sale.

In reply to these inquiries the plaintiff informed the European capitalists by letter that there was a strong probability that San Francisco and the Bay cities would desire to adopt the Blue Lakes supply, and that it was conceded that the Hetch Hetchy privileges would be denied, a circumstance which in the minds of the plaintiff and of the Sierra Blue Lakes Water and Power Company would have rendered the purchase of the properties of the latter company by San Francisco almost a necessity. All of this correspondence will be found in the record at pages 274 et seq. It has a most vital bearing upon the question of the plaintiff's interest and motives in the campaign which he waged in Congress against San Francisco's application for Hetch Hetchy privileges, and in our opinion brings out in striking relief the error committed by the trial court in admitting evidence of the plaintiff's good reputation for truth and veracity, an error of which we hereinafter complain.

The plaintiff introduced evidence to prove that one Bartell, an assistant engineer in the office of the City Engineer of San Francisco had prepared a report dealing with available water rights on the Mokelumne River in California including water rights owned or claimed to be owned by the Sierra Blue Lakes Water and Power Company.[20] This report, claimed by the plaintiff to be favorable to the claims of the Sierra Blue Lakes Water and Power Company, had never been delivered to the Board of Army Engineers appointed to investigate the various sources of water supply available to San Francisco. This fact was the sole basis for the charge made by the plaintiff that the report had been wilfully and deliberately suppressed by the City Engineer's office.[21] But the defendant Examiner Printing Company showed that during the investigation by the Board of Army Engineers the City Engineer of San Francisco became ill and incapacitated[22] and that the work of investigating the Mokelumne River as a source of water supply had been delegated to C. E. Grunsky, another eminent engineer.[23] It was further shown that Mr. Grunsky filed an elaborate report with the Board of Army Engineers,[24] that during the preparation of that report he had access to the Bartell report,[25] that he had frequent consultations with Mr. Bartell,[26] its author, and that he had embodied in his own report much of the data of the Bartell report,

---

[20] R., p. 189.
[21] R., pp. 126, 131.
[22] R., p. 225.
[23] R., p. 225.
[24] R., pp. 230, 231, 235.
[25] R., pp. 335, 338.
[26] R., p. 337.

among other things, many maps,[27] including one which, according to Mr. Grunsky, was the essence of the Bartell report and contained practically all of the conclusions of the Bartell report.[28] The plaintiff admitted that he had never seen the Grunsky report[29] although he knew that such a report had been prepared and was on file with the Board of Army Engineers. He admitted that he had been satisfied with reading excerpts from the Grunsky report contained in an independent report made by Mr. Freeman,[30] the engineer having general supervision of all of the investigations made on behalf of the City of San Francisco. This evidence, according to the claim of the Examiner Printing Company, indisputably establishes the fact that the plaintiff had been grossly careless in making his charge that the Bartell report had been suppressed from the Board of Army Engineers. While it did not get before that body as an independent report, the evidence showed that its essential features[31] were embodied in the report made by Mr. Grunsky which the plaintiff never examined and as to the contents of which he carelessly permitted himself to be ignorant while charging public officials with dereliction of duty and wilful suppression of evidence.

The foregoing statement of the issues in the case shows the efforts that should have been legitimately exerted by the respective parties in support of their claims and sufficiently indicates the limits within which we claim the evidence should have been confined. The

---

[27] R., pp. 335, 336, 337.
[28] R., p. 338.
[29] R., pp. 230, 231.
[30] R., p. 231.
[31] R., p. 338.

evidence, however, was not confined within those limits, and it is for the erroneous reception of evidence not tending to prove the facts in issue but calculated to bias and prejudice the jury, that we complain.

II.

Specifications of Errors.

As already stated, no point is made that the evidence is insufficient to support the verdict. No exception is taken to the charge of the court. The errors of which we complain are limited exclusively to rulings on the admission of evidence.

The assignment of errors hereinafter contained sets forth forty-four rulings which we claim were erroneous. These rulings may be grouped into eight classes, however, inasmuch as many of the rulings present the same general question. The evidence which we claim was erroneously admitted concerned the following:

(1) Evidence of the plaintiff's good reputation in Europe and America "for the *truth* and *veracity* of his report as a consulting engineer";

(2) Evidence of articles in various newspapers throughout the United States on July 7th and July 8th, 1913, publishing the charges made by Eugene J. Sullivan of the suppression of a report and other charges against the City Engineer and other public officials of San Francisco (the article complained of was published December 2, 1913);

(3) Evidence of the fact that a report made by the witness Grunsky on the run-off from Alameda Creek had been turned in late to the Board of Army Engineers; and in connection therewith evidence of what transpired before the Secretary of the Interior at the time said report was delivered to the Board of Army Engineers;

(4) Evidence of statements made by the plaintiff at a meeting of the Civic Center League held in the Hotel St. Francis on November 5th, 1913 (the articles complained of were published December 2, 1913);

(5) Evidence by the witness William J. Wilsey to the effect that the plaintiff was in his employ and that no reports made by the plaintiff to the witness were made for the purpose of selling the properties of the Sierra Blue Lakes Water and Power Company to San Francisco, but were for use exclusively in selling said properties in Europe, and that this fact was known by the plaintiff;

(6) Evidence concerning the amount of money expended on the properties of the Sierra Blue Lakes Water and Power Company and the fact that that company had given options for the purchase of its properties for which a considerable consideration had been paid;

(7) Evidence of statements made in the San Francisco Examiner in its issues of November 30, 1913, and December 1, 1913, with respect to the proposed Washington edition of the San Francisco Examiner (these matters were objected to especially by the defendant Hearst);

(8) Evidence contained in copies of certificates filed with the Post Office authorities showing that the defend-

ant Hearst is the only person owning more than one per cent of the stock of various newspapers in the United States.

The assignments of error hereinafter contained do not embrace all of the assignments of error contained in the record. Some of the latter assignments we do not press for the reason that, although we believe them to be well made, other objections are of more pressing importance. We therefore exclude from the specification of errors which follows, those assignments of error with which we will not specially deal in the brief.

The matters with which we will hereafter deal and the errors upon which we seek a reversal are as follows:

Assignment No. 1.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. Mr. Sullivan, how much, as near as you can recollect, have you expended on the company's water properties, in construction and in other works and matters, in order to maintain your company's and the bondholders', water rights and other rights since you became president of the company in 1910?"

to which the witness answered: "About $100,000", the same being contained in the transcript of record on page 152 and said ruling constituting Exception No. 3.

Assignment No. 2.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. Was it necessary to obtain such moneys from time to time in order that the company's water rights and properties be maintained for the benefit of the bondholders and stockholders of the Sierra Blue Lakes Water and Power Company, of which you were the president?"

to which the witness answered: "It was.", the same being contained in the transcript of record on page 153 and said ruling constituting Exception No. 4.

Assignment No. 3.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. Did you consider them to be of such value that you would feel justified in paying heavy interest or making heavy sacrifices in order that you should obtain money necessary to obtain such rights and properties for your company and on behalf of your bondholders?"

to which the witness answered: "Yes, sir.", the same being contained in the transcript of record on page 153 and said ruling constituting Exception No. 5.

Assignment No. 4.

The court erred in overruling the objection of counsel for the defendants to the following question asked by

counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. I will ask you, Mr. Sullivan, whether or not during the time since you became president of the company, you have had outstanding any options for the purchase, whether you have given any options for the purchase of your properties, upon which a considerable consideration was paid down?"

to which the witness answered: "Yes, sir.", the same being contained in the transcript of record on page 154 and said ruling constituting Exception No. 6.

Assignment No. 5.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. What was that statement, Mr. Sullivan?" (referring to a statement made by the plaintiff at a meeting of the Civic Center League on November 5, 1913, at the Hotel St. Francis)

to which the witness answered:

> "He said to the audience that there was a report made by an assistant city engineer named Max J. Bartell on the Mokelumne River upper catchment in which that report said that the Mokelumne River watershed would supply four hundred and some odd—He stated that there was a report suppressed from the Advisory Board of Engineers, on the water supply.",

the same being contained in the transcript of record on page 164 and said ruling constituting Exception No. 9.

Assignment No. 6.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. I will ask you to state whether or not Mr. O'Shaughnessy took any notice of the statements made by Mr. Aston and made any reply thereto, any public reply thereto?"

to which the witness answered: "He did.", the same being contained in the transcript of record on page 165 and said ruling constituting Exception No. 10.

Assignment No. 7.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. So far as you can recall, what was his answer to the statement that there was such a report as Mr. Aston stated to be in existence?"

to which the witness answered:

> "He said that Mr. Max J. Bartell was merely one of one hundred and fifty assistants.",

the same being contained in the transcript of record on page 166 and said ruling constituting Exception No. 11.

Assignment No. 8.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 2. State whether or not in or about May, 1913, you employed the plaintiff, Taggart Aston, to make

> an engineering report upon an hydro-electric and irrigation project in California.''

to which the witness answered: ''I did.'', the same being contained in the transcript of record on page 174 and said ruling constituting Exception No. 12.

Assignment No. 9.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> ''Q. 3. If you answer the last interrogatory in the affirmative, state in connection with what particular project or property you employed Mr. Aston to make such a report.''

to which the witness answered:

> ''Known in California as the Sierra Blue Lakes Water & Power Company.''

the same being contained in the transcript of record on page 175 and said ruling constituting Exception No. 13.

Assignment No. 10.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> ''Q. 4. If you state that the project upon which said report was to be made was that connected with the Sierra Blue Lakes Water and Power Company's properties on the Mokelumne River in California, state whether or not these properties are also known as 'The Sullivan Properties,' and whether or not they are the property of a company of which Mr. Eugene J. Sullivan was at that time the president.''

to which the witness answered:

> ''Yes, they are the same properties.'',

the same being contained in the transcript of record on page 175 and said ruling constituting Exception No. 14.

Assignment No. 11.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 5. State whether or not the report made by Mr. Aston pursuant to his employment by you, was in writing; also whether or not he made more than one such report to you in connection with these properties."

to which the witness answered:

> "Yes, he made a supplemental report later which I asked him to make.",

the same being contained in the transcript of record on page 176 and said ruling constituting Exception No. 15.

Assignment No. 12.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 7. State whether said report or reports were obtained by you, or were ever used by you, for the purpose of selling the so-called Sullivan properties on the Mokelumne River in California, to the City of San Francisco."

to which the witness answered:

> "No, I never offered anything to the city of San Francisco."

the same being contained in the transcript of record on page 176 and said ruling constituting Exception No. 16.

Assignment No. 13.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 8. State whether or not said report or reports were obtained by you for use exclusively in offering said properties for sale in Europe."

to which the witness answered: "They were.", the same being contained in the transcript of record on page 176 and said ruling constituting Exception No. 17.

Assignment No. 14.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 9. If your answer to the last interrogatory is in the affirmative, state whether or not you offered said properties for sale in Europe."

to which the witness answered:

> "I did, I offered the properties for sale in Europe."

the same being contained in the transcript of record on page 177 and said ruling constituting Exception No. 18.

Assignment No. 15.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 10. If you answer the foregoing interrogatory in the affirmative, state whether or not Mr. Aston had an interest, contingent or otherwise, in any sale that you might make of said properties in Europe."

to which the witness answered:

> "No understanding whatever with Mr. Aston as to any commission, but I certainly intended to give him fair commission out of any work I done; but there is no written proposition of any kind. In fact, he never asked any questions.",

the same being contained in the transcript of record on page 177 and said ruling constituting Exception No. 19.

Assignment No. 16.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 12. If you answer the last interrogatory (as to whether or not he had informed the plaintiff who the parties were in Europe with whom he was negotiating for the sale of said properties) in the affirmative, state whether or not you notified Mr. Aston as to any particular use or purpose for which said properties were desired by said parties in Europe, if in fact any particular use or purpose was specified."

to which the witness answered:

> "Yes, I told him what we were figuring on using the properties for, and the purposes were hydro-electric and irrigation."

the same being contained in the transcript of record on page 178 and said ruling constituting Exception No. 20.

Assignment No. 17.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world,

> meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this country and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer.''

to which the witness answered: ''Yes, I do.'', the same being contained in the transcript of record on page 179 and said ruling constituting Exception No. 22.

Assignment No. 18.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> ''Q. 20. State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No. 18, in any or all of the quarters aforesaid.''

to which the witness answered:

> ''From all the information that I have been able to secure regarding Mr. Aston, both in America and in Europe, his reputation has been first class.''

the same being contained in the transcript of record on page 179 and said ruling constituting Exception No. 23.

Assignment No. 19.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Richard Harte Keatinge:

> ''Q. Well, make a fair statement of the nature of your relations with Mr. Aston at that time, from which the jury can draw the conclusion with reference to these properties and to any report which you know he made upon those properties at that time.''

to which the witness answered:

> "Mr. Wilsey employed Mr. Aston to make this report—Mr. W. J. Wilsey of Portland. We paid half the expense of making the investigation, but I do not believe that Mr. Aston was ever in our employ. I don't know whether legally he was ever in our employ. We paid half the expense and Mr. Wilsey paid the other half of the expense, but he was Mr. Wilsey's man, I should say."

the same being contained in the transcript of record on page 180 and said ruling constituting Exception No. 24.

Assignment No. 20.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Clement H. Miller:

> "Q. I will ask you to state whether or not you have any recollection of Mr. Aston making a statement of what his connection was with reference to having disclosed certain facts and conditions surrounding the suppression of the so-called Bartell-Manson engineering report of the city at that meeting at that time and place." (Civic Center Meeting on November 5, 1913)

to which the witness answered:

> "Mr. Aston read quite a lengthy statement from manuscript, and I have a general recollection of the main points that were covered in that statement. * * * It was particularly relating to that suppressed report."

the same being contained in the transcript of record on page 181 and said ruling constituting Exception No. 25.

Assignment No. 21.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness George A. McCarthy:

> "Q. If you answer the foregoing interrogatory (as to whether the witness had gone to the City Engineer's office toward the end of June, 1913, for the purpose of inspecting the original of the Bartell report) in the affirmative, state whom you saw in connection with the object of your errand, and what was said and done between you upon that occasion in connection with said suppressed report."

to which the witness answered:

> "I saw Mr. Bartell and made known the object of my visit, which was to obtain use of, if possible, the report and documents which had been returned to his office, or if they could not be removed from the office, to make certain extracts from them. Mr. Bartell produced a copy of the report and examined it in my presence, but would not allow me to again have possession of it nor to make any extracts from it."

the same being contained in the transcript of record on page 183 and said ruling constituting Exception No. 26.

Assignment No. 22.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness George A. McCarthy:

> "Q. If you answer the foregoing interrogatory in the affirmative, state who were present at such conversation or conversations, where they were held; and what was said or done there, with reference to said report. Did you see the original of said report then and there in the possession of Mr. Bartell?"

to which the witness answered:

> "The only conversation I had with Mr. Bartell regarding the report was on the occasion of my visit to his office in June, when I again endeavored to obtain the document for purposes of reference. No person was present except Mr. Bartell, and he refused

> to allow the document to again go out of his office or to allow any extracts to be made from it. Mr. Bartell produced the copy of the report, but to the best of my knowledge it was not the copy we had in the office of Mr. Taggart Aston. The original contained many marginal notes in pencil which the copy produced by Mr. Bartell did not contain, to the best of my knowledge."

the same being contained in the transcript of record on page 184 and said ruling constituting Exception No. 27.

Assignment No. 23.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Stanley Behneman:

> "Q. Will you state in your own way the facts and circumstances in connection with that episode?" (the visit of an employee of the City Engineer's office to the office of the plaintiff, to make a demand for the return of certain data)

to which the witness answered:

> "It was shortly before one o'clock. This gentleman I did not know at the time when he entered the door; he made certain demands—he said he was from the engineering department of the City of San Francisco and he wished to have certain records and plans which Mr. Aston had taken. I don't know under what conditions they were taken. He wanted them right away, or he would have a warrant issued for them. He appeared to be very excited. He wanted to know when Mr. Aston would return. I told him I did not know. He said he would wait a while. He did wait quite a while and then he decided to go and he said that these documents must be back by one o'clock."

the same being contained in the transcript of record on page 187 and said ruling constituting Exception No. 30.

Assignment No. 24.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. Now, I will ask you, Mr. Aston, to state briefly what you may have done in calling upon the city, as is stated here in this letter, in company with Mr. Hart and Mr. Burleson, and state whether or not you were then shown a copy of the so-called Bartell-Manson report with the essential statement referred to in your letter here?"

to which the witness answered:

> "On account of my assistant, Mr. McCarthy, having informed me that he had noticed in the copy shown to him by Mr. Bartell that this essential statement, which of course was the whole gist of this report which had affected me in communicating with Washington—on account of Mr. McCarthy having told me that he had not seen this essential statement in the copy which Mr. Bartell showed to him, I informed the president of the board of health, Mr. Barendt, who called at my office,—I had never known him before, I informed him that I believe that the city was now showing a copy which they purported to be this report, in which they had eliminated this very essential statement made by Mr. Manson, the city engineer, Mr. Barendt, on the 8th day of July, went up to Mr. Judell, his fellow-official. By reason of what was told me by Mr. Barendt on his return, I requested Mr. Barendt to go back with me to Mr. Judell in order that I could further investigate what Mr. Barendt had told me regarding it, which coincided with what Mr. Bartell had told me. Mr. Judell had shown Mr. Barendt this report. I went with Mr. Barendt to Mr. Judell's office. Mr. Barendt introduced me to Mr. Judell. Mr. Judell was the president of the board of works. He was at the head of all the engineering department. As the chief official, responsible for the city, I told Mr. Judell that I would like to see this

> report, as I wished, if I found this elimination had been made, I wished to make the charge that the elimination had been made. I asked Mr. Judell would he kindly do as he had done with Mr. Barendt, show me that report as the chief of the public works department and chief of the engineers' department. Mr. Judell said, 'I will not show you that report, because we are not going to help the enemies of Hetch Hetchy'. Then I asked Mr. Judell would the engineering department show it to me. He said he could not speak for the engineering department * * * On account of that, I asked Mr. Barendt to come up with me to the engineering department. Mr. Barendt said, 'this will get me in bad with the department if I pursue this matter any further'."

the same being contained in the transcript of record on page 252 and said ruling constituting Exception No. 32.

Assignment No. 25.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. State whether or not you had occasion to make any public statements with reference to the matter of this report and of your interest in disclosing the fact of it on November 5, 1913, before the Civic Center meeting at the St. Francis?"

to which the witness answered:

> "I had asked Mr. O'Shaughnessy to give me ten or fifteen minutes to look into the Mokelumne matter, and I told him that I thought that after he had heard and seen my data on it I was sure that he would personally remove the misrepresentations made regarding it in the previous report. This was in a conversation over the 'phone. It was either the day before or two days before the Civic Center meeting. Mr. O'Shaughnessy replied very sharply that he was too busy, he would give me no time. As this was the first public meeting at which anyone had an opportunity to remove certain miscon-

> ceptions that had been planted in the people's mind by the fact of the newspapers not publishing anything but one side of the matter, I therefore decided that it was the proper opportunity for me to tell the public my view of the question, especially as the 'Examiner' and others had referred to me as Mr. Sullivan's engineer and had connected me with him in the matter, and in a manner that I did not approve of. I therefore wrote out a speech which I delivered at the meeting. It was a meeting at which both sides were heard, and at which discussion was had on the various papers. I therefore wrote out a speech and delivered that speech. I afterwards had it printed and sent it to each of the senators before this libel was published. I have an acknowledgment from senators in regard to having received the printed document which is a true copy of the written-out speech that I had made at the time.''

the same being contained in the transcript of record on page 255 and said ruling constituting Exception No. 33.

Assignment No. 26.

The court erred in overruling the objection of counsel for the defendants to and in admitting in evidence a copy of the San Francisco Examiner of Thursday, November 6, 1913, purporting to give an account of the proceedings of the Civic Center meeting of November 5, 1913, and what was said and done by the various speakers of said meeting, the same being contained in the transcript of record on page 257 and said ruling constituting Exception No. 34.

Assignment No. 27.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. Did you make any statement at that time and place (Civic Center meeting) with reference to the fact that this supply from the Mokelumne had been discriminated against in various city reports?"

to which the witness answered: "Yes, sir.", the same being contained in the transcript of record on page 263 and said ruling constituting Exception No. 35.

Assignment No. 28.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. State in what points you made the statement that the supply had been discriminated against."

to which the witness answered:

> "I stated that the city's reports had been biased in that they made unfair comparisons, they minimized our sources, supplies, and estimates of our sources, and exaggerated the estimates of other sources and thus made a false and unfair comparison with the Hetch Hetchy project. In particular, I mentioned one instance wherein Mr. Freeman's report, in a very essential item, the item of concrete in the Hetch Hetchy dam as compared with the Mokelumne dams, he priced the Mokelume dam——"

the same being contained in the transcript of record on page 263 and said ruling constituting Exception No. 36.

Assignment No. 29.

The court erred in overruling the objection of counsel for the defendants and in admitting in evidence a copy of the San Francisco "Examiner" of November 30, 1913, purporting to contain a statement respecting the proposed Washington edition of said San Francisco

"Examiner", about to be published, the same being contained in the transcript of record on page 300 and said ruling constituting Exception No. 37.

Assignment No. 30.

The court erred in overruling the objection of counsel for said defendant William Randolph Hearst and in admitting the evidence over the objection of said defendant the exhibit mentioned in the last preceding assignment of error, the same being contained in the transcript of record on page 301 and said ruling constituting Exception No. 38.

Assignment No. 31.

The court erred in denying the motion of counsel for said defendants to strike out the testimony of witness Thomas R. Marshall with respect to a conversation between the witness and John Temple Graves concerning the Hetch Hetchy bill, and the request of Mr. Graves that the witness give him a written statement to the effect that the witness would vote for the Hetch Hetchy bill if the matter came up to him, the same being contained in the transcript of record on page 310 and said ruling constituting Exception No. 39.

Assignment No. 32.

The court erred in overruling the objection of counsel for said defendants to and in admitting in evidence an article in the San Francisco "Examiner" of December 1st, 1913, purporting to be a newspaper dispatch under the headline "Marshall for Hetch Hetchy. Vice-presi-

dent will cast vote for water bill if necessary. Gives views to the 'Examiner'. Writes for special edition that is to be printed in Washington''. Said dispatch contained a purported statement from Hon. Thomas R. Marshall, Vice-president of the United States, giving his reasons for supporting the Hetch Hetchy bill, the same being contained in the transcript of record on page 311 and said ruling constituting Exception No. 40.

Assignment No. 33.

The court erred in overruling the objection of counsel for said defendants and admitting in evidence the matter in the article of the San Francisco ''Examiner'' of December 1st, 1913, immediately following the purported dispatch referred to in the last preceding assignment of error, which succeeding matter purports to be a statement concerning the proposed Washington edition of the San Francisco ''Examiner'' and the manner in which it would be distributed, the same being contained in the transcript of record on page 312 and said ruling constituting Exception No. 41.

Assignment No. 34.

The court erred in overruling the objection of counsel for said defendants to and admitting in evidence a copy of the ''Arizona Gazette'', a newspaper of July 7, 1913, purporting to contain a Washington dispatch under the heading ''Hetch Hetchy Chicanery'', and stating that Eugene J. Sullivan of San Francisco had before the House Public Lands Committee made charges of chicanery suppression of report and political bias of the engineers in the interest of the Hetch Hetchy project

for supplying San Francisco with water, the same being contained in the transcript of record on page 314 and said ruling constituting Exception No. 42.

Assignment No. 35.

The court erred in overruling the objection of counsel for said defendants to and admitting in evidence a copy of the "Evening World-Herald" newspaper of Omaha, Nebraska, dated July 7, 1913, containing an article under the heading "Alleges crookedness in Hetch Hetchy plan," and which said article was practically identical with the article referred to in the last preceding assignment of error, the same being contained in the transcript of record on page 314 and said ruling constituting Exception No. 43.

Assignment No. 36.

The court erred in overruling the objection of counsel for the defendants to and admitting in evidence a copy of the "Herald Republican" newspaper of Salt Lake City, Utah, dated July 8, 1913, containing an article headed "Charges Chicanery in Hetch Hetchy Project", which said article was practically identical with the article referred to in the last preceding assignment of error, the same being contained in the transcript of record on page 315, and said ruling constituting Exception No. 44.

Assignment No. 37.

The court erred in overruling the objection of counsel for defendants to and admitting in evidence Plaintiff's Exhibit No. 44, purporting to be certified copies of

certificates filed with the post-office authorities for the purpose of showing the proprietorship and ownership of the San Francisco "Examiner" of San Francisco, California, the Los Angeles "Examiner" of Los Angeles, California, the Atlanta "Georgian" of Atlanta, Georgia, the Chicago "Evening American" of Chicago, Illinois, the Boston "American" of Boston, Mass., and the New York "Evening Journal" of New York, N. Y. Said certificates purport to show that all of the papers referred to are published by corporations with the exception of the Los Angeles "Examiner", which is published by William Randolph Hearst, and that said William Randolph Hearst is the only person named as owner of stock of the corporations owning the other papers mentioned, the same being contained in the transcript of record on page 320, and said ruling constituting Exception No. 47.

Assignment No. 38.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Q. With reference to your employment at or about this time to furnish a report of the run-off from Alameda Creek proper of the Spring Valley Water Company, that report of yours was turned in when?"

to which the witness answered:

> "The statement I made this morning with reference to turning in everything to the Army Board related to the matter that bore upon the report that was then under discussion.",

the same being contained in the transcript of record on page 369, and said ruling constituting Exception No. 48.

Assignment No. 39.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Do you know what became of that report of yours that you turned in? Did it go to the Army Board?"

to which the witness answered:

> "The report was delivered very late. I don't remember the date. I haven't had occasion to look at it for a long time. I think that was delivered some time in October or November."

the same being contained in the transcript of record on page 370, and said ruling constituting Exception No. 49.

Assignment No. 40.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Q. Were your conclusions upon that investigation favorable or unfavorable to the Spring Valley Water Company's contention?"

to which the witness answered:

> "I cannot say as to whether it was favorable or unfavorable to the city or to the Spring Valley Water Company. The finding with reference to the quantity of water flowing in Alameda Creek was not at great

> variance with what was claimed by the Spring Valley Water Company.''

the same being contained in the transcript of record on page 371, and said ruling constituting Exception No. 50.

Assignment No. 41.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for plaintiff of the witness William F. Bade:

> ''Q. And Mr. Freeman was there in the representative capacity of furnishing or accounting for the furnishing of data which the Secretary had called for under the order of the continuance, the show cause order?''

to which the witness answered:

> ''Mr. Freeman expressly stated he was representing the city officials, and Mr. Fisher so accepted it.''

the same being contained in the transcript of record on page 382, and said ruling constituting Exception No. 51.

Assignment No. 42.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William F. Bade:

> ''Q. State whether or not anything came out at that hearing with reference to any suppressed report which had not been furnished up to the date of that hearing.''

to which the witness answered: ''Yes, sir'', the same being contained in the transcript of record on page 382, and said ruling constituting Exception No. 52.

Assignment No. 43.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for plaintiff of the witness William F. Bade:

> "Q. State what if anything appeared at this hearing as coming from the city, or the representative of the City of San Francisco, which showed that there was in existence a report with reference to any available water supply to San Francisco which had not reached the Army Board or the Secretary of the Interior up to that time."

to which the witness answered:

> "On the complaint of Mr. McCutcheon to Secretary Fisher that the Marks-Grunsky-Hyde report, that they had never been permitted access to it although repeated requests had been made; upon that presentation by Mr. McCutcheon Secretary Fisher asked for that report, if there was such a report—asked Mr. Freeman, representing the city. Mr. Freeman then produced the report and said it was the only copy he had, and turned it over to Secretary Fisher, and he to the Advisory Army Board who also stated that they had not had access to it."

the same being contained in the transcript of record on page 384, and said ruling constituting Exception No. 53.

Assignment No. 44.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness William F. Bade:

> "Q. What did Mr. Freeman say?"

to which the witness answered:

> "Mr. Freeman then handed over the report and said it was the only copy he had, but he was willing to turn it over to Secretary Fisher and the Army Board."

the same being contained in the transcript of record on page 386, and said ruling constituting Exception No. 54.

Assignment No. 45.

The court erred in denying the motion of counsel for defendants to strike out all of the testimony of the witness William F. Bade with respect to the proceedings before Secretary of the Interior Fisher with respect to which the witness had testified that he was present at the meeting and that a charge had been made by officials of the Spring Valley Water Company that they had been denied access to a report made by C. E. Grunsky to J. R. Freeman with respect to certain properties of the Spring Valley Water Company, whereupon Secretary Fisher had asked about the report and the same was produced by Mr. Freeman, handed to Secretary Fisher and by him handed to the Board of Army Engineers, the same being contained in the transcript of record on page 387, and said ruling constituting Exception No. 55.

III.

Argument.

A. THE COURT ERRED IN ADMITTING PROOF OF THE GOOD REPUTATION OF THE PLAINTIFF IN ADVANCE OF AN ATTACK THEREON BY THE DEFENDANTS.

In the deposition of William J. Wilsey, one of the witnesses for the plaintiff, he was asked what was the reputation of the plaintiff "for the *truth* and *veracity* of his reports as a consulting engineer".[32] He replied that

[32] R., p. 179.

as far as he had been able to ascertain plaintiff's reputation both in Europe and America was first-class.[33] The admission of this evidence is the basis of assignments of error numbers 18 and 19.

At no time throughout the trial did the defendants call in question the plaintiff's good reputation as a man or as an engineer. Not only, therefore, was the evidence of the plaintiff's good reputation admitted in advance of an attack by the defendants but in the absence of any attack by the defendants. The reception of such evidence was clearly erroneous.

The plaintiff offered himself as a witness upon the trial. As a witness he was entitled to the same consideration as every other witness. The defendants were entitled to have his testimony weighed by the jury in the same manner and according to the same standard as the testimony of the other witnesses. They were entitled to have the jury apply to the testimony of the plaintiff the same criteria as they applied to the testimony of all other witnesses. It is because it is impossible for a court to determine how much weight and influence evidence of good reputation of a witness for "truth and veracity" has upon the mind of a jury in determining the amount of credit to be given to his testimony that courts almost universally reject such evidence. As said in *Title Insurance, etc., Co. v. Ingersoll,* 153 Cal. 1, it "may have been all-powerful to that effect". In short, it may be the factor that turns the scale in favor of the plaintiff upon the issues involved in the case.

---

[33] R., p. 180.

The rule "supported by a practical unanimity of authority" is that evidence of the good reputation of a plaintiff in an action for libel is never admissible in advance of an attack upon it by the defendant.

Davis v. Hearst, 160 Cal. 143, 185.

In the opinion in the latter case numerous authorities are cited in support of this proposition.

See, also,

Title Insurance Co. v. Ingersoll, 153 Cal. 1.

The rule enunciated in *Davis v. Hearst* is codified in Section 2053 of the Code of Civil Procedure of California in the following language:

> "Evidence of the good character of a party is not admissible in a civil action nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character."

This statute and the construction placed upon it by the Supreme Court of California are binding upon the federal courts. Authorities to this proposition are unnecessary.

See, however,

2 Foster on Federal Practice, 1573, and cases cited.

In *Ryan v. Bindley,* 1 Wall. 66; 17 L. Ed. 559, it is said (p. 560):

> "The rules of evidence prescribed by the laws of a state are rules of decision for the United States courts while sitting within the limits of such state under the 34th Section of the Judiciary Act."

See, also,

American Agricultural Chemical Co. v. Hogan, 213 Fed. 416, 420.

It may be stated in passing that the rule stated in Section 2053 of the Code of Civil Procedure was not intended by the framers of the code to make any new rule; in fact the section merely expresses the common law rule, which excludes evidence of good reputation in advance of an attack, and which, as stated in *Davis v. Hearst,* supra, is "supported by a practical unanimity of authority".

In *Vance v. Richardson,* 110 Cal. 414 (1895), the court said:

> "Section 2053 of the Code of Civil Procedure is merely a concise statement of the rule as it is to be found in the text books and judicial decisions."

As we have already pointed out, this statutory provision is binding upon the federal courts; so likewise is the construction placed upon it by the Supreme Court of California.

The question whether evidence of the good reputation of a plaintiff is admissible in advance of an attack, in a federal court in California is definitely determined and answered in the negative by Section 2053 of the Code of Civil Procedure of California as construed in *Davis v. Hearst,* supra. Lest it be claimed, however, that the decision in *Davis v. Hearst* was made without reference to Section 2053 of the Code of Civil Procedure, because that section is not mentioned in the decision, it may be observed that this circumstance is

of no effect. This court is bound to assume that the Supreme Court of California in deciding *Davis v. Hearst* did so with reference to the provisions of Section 2053 of the Code of Civil Procedure. It cannot be presumed that the California Supreme Court did not know of the existence of Section 2053, or, that knowing of its existence, did not give to it the force and effect to which it was entitled.

In *Cross v. Allen* (1891), 141 U. S. 528, the court said (p. 538):

> "The only remaining question is, whether, under the Constitution and laws of Oregon in force at the time these contracts were made, a married woman could, in an event, bind her separate property for the payment of her husband's debts. *Without discussing this question upon its merits, it is sufficient to say that the Supreme Court of the State has decided it in the affirmative in at least two separate cases* (Moore v. Fuller, 6 Or., 274, and Gray v. Holland, 9 Or., 513); *and it is not our province to question such construction.* Being a construction by the highest court of the State of its Constitution and laws, we should accept it.
>
> "It is said, however, that the cases just cited were decided without having been fully argued and without mature consideration of this question, upon the mistaken assumption that it had been previously decided in the affirmative by the Supreme Court if the State, and, therefore, they have not become a rule of property in the State and are not binding upon this court. We are not impressed with this contention. Such argument might with propriety be addressed to the Supreme Court of the State, but it is without favor here. *We are bound to presume that when the question arose in the State court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon.*"

In *In re Floyd & Hayes* (1915), 225 Fed. 262, the syllabi are as follows:

> "Federal courts are bound to assume that, when a question arose in a state court, it was thoroughly considered by that tribunal, and that the decision rendered by it embodied its deliberate judgment.
>
> "Unless some federal question is involved, the interpretation placed upon a state statute by the highest appellant tribunal of the state is binding and conclusive upon all federal courts, including the United States Supreme Court.
>
> "It is the duty of a federal court to follow the latest decision of the state court, though it may differ from prior decisions of that court, and though the federal court may have previously come to a different conclusion."

If, therefore, the decision in *Davis v. Hearst* be given the controlling effect on the construction of Section 2053 of the Code of Civil Procedure of California to which the authorities hold it is entitled, there can be no question but that the trial court in the present case committed error in receiving evidence of the plaintiff's good reputation in advance of an attack by the defendants.

Even though we were to assume, however, that the construction of Section 2053 of the Code of Civil Procedure was not foreclosed by the decision in *Davis v. Hearst* but on the contrary was an open question, it is clear that under it no evidence of good reputation of a party is admissible in any action in advance of an attack upon it. This can be made very clear.

Evidence of the character (good or bad) of a *party* is never admissible in a civil action unless the issue involves character.

Vance v. Richardson, 110 Cal. 414 (1895);
Van Horn v. Van Horn, 5 Cal. App. 719 (1907);
Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1 1908.

See, also,

Gould v. Bebee, 134 La. 123; 63 So. 848 (1913);
5 Am. & Eng. Encyc. of Law, (2nd Ed.) 852.

The portion of Section 2053, C. C. P., therefore, which provides that "evidence of the good character of a party is not admissible in a civil action * * * *unless the issue involves his character*", does not add anything to the preceding portion. Upon common law principles unless the issue involves character, no evidence of the character of either party (*quoad* party) is admissible. Section 2053, therefore, in permitting evidence of the good character of a party in a civil action which involves his character, did not add anything to the common law rule. Such evidence was *always* admissible at common law *when the issue involved character,* just as it was *never admissible* at common law *unless the issue involved character.* The latter portion of Section 2053, therefore, merely affirms the common law rule and makes it essential that the issue involve character before a party is permitted to prove his good character.

It will be noted that Section 2053 deals with two classes of persons (a) parties, and (b) witnesses. The

term "parties" as used in this section can only mean "parties *who are not witnesses,*" for otherwise there would be no necessity for a distinction between "parties" and "witnesses". Reading the section as it stands, but eliminating the portions dealing with witnesses (including of course "parties" who have testified) the section provides that

> "Evidence of the good character of a party is not admissible in a civil action *until* the character of such party has been impeached or *unless* the issue involves his character."

It is evident from the section as thus read that evidence of the good character of a "*party*" can be given only after such character has been impeached. And inasmuch as the character of a party (*quoad* party) can be impeached only where the issue involves character, it necessarily follows that in order that evidence of the good character of a party may be given in a civil action it is necessary (a) that the action involve character, and (b) that the party's character be first impeached.

That this is the proper construction of the section is evident from the different conjunctions that introduce the two clauses of the section,—"*until* the character of such party or witness has been impeached" and "*unless* the issue involves his character". The latter clause is introduced by the conjunction "unless" (i. e., "except") and shows that evidence of good character is inadmissible in any civil action *except* civil actions involving character. The clause introduced by the conjunction "until" does not mark an exception, strictly

so-called, but rather a limitation of time. In other words, the use of the two conjunctions "until" and "unless" in Section 2053 of the Code of Civil Procedure clearly manifests the purpose of the Legislature to exclude evidence of good character in all civil actions *except those involving character,* and even in such cases to exclude such evidence *until* the party's good character has been impeached. In short, the second clause of the section indicates the *class* of cases in which evidence of the party's character is admissible, and the former clause indicates the *time* during the trial of such cases when such evidence becomes admissible. The result is that under the statutory law of California, evidence of good character of a party (*quoad* party) is never admissible *unless* the issue involves character and even then not *until* the good character of the party has been first impeached.

This is the necessary construction of the statute; it is the construction demanded by the plain import of the language of the statute, and independent of the controlling effect of the decision of *Davis v. Hearst;* it is the construction, we submit, which must be adopted by this court. In addition it is the construction which, as Mr. Justice Henshaw says in *Davis v. Hearst,* "is supported by a practical unanimity of authority".

We submit, therefore, that the court erred in the reception of evidence of the plaintiff's good reputation not only in advance of an attack thereon by the defendants but in the utter absence of such an attack.

Lest it be claimed, as it was in the trial court, that such evidence even though erroneous was not preju-

dicial, it may be observed that a similar argument has been advanced without success in numerous other cases. In fact it is the common argument of a litigant who succeeds in getting incompetent evidence before a jury and secures a verdict in his favor, that after all the error committed in the reception of the evidence was not prejudicial. The answer which should be made to such an argument is well put in *Miller v. Territory of Oklahoma,* 149 Fed. 330, where the court replying to a like argument said (p. 339):

> "The reply the law makes to such suggestion is: That after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged * * * that whatever the prosecutor against the protest of the defendant has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

In *Title Insurance & Trust Co. v. Ingersoll,* 153 Cal. 1, evidence of the good reputation of the defendant was admitted. The Supreme Court held the admission of this evidence to be erroneous, and in reply to the argument that the error was not prejudicial, said (p. 9):

> "It is impossible for this court to say how much weight and influence this evidence of good reputation of the witness had upon the mind of the trial judge in determining the amount of credit to be given to his testimony. As has been said before, under the peculiar circumstances of this case, it 'may have been all-powerful to that effect,' and may have been the factor that turned the scale in favor of defendant upon the matters embraced in the findings we have discussed. Counsel for defendant evidently thought it was important evidence,

> or they would not have offered it, and the trial judge evidently considered it material, or he would not have admitted it. If the trial court was led to place more reliance upon the testimony of defendant by reason of such evidence of reputation than he would otherwise have done, and we cannot say that this was not the result, plaintiff was clearly prejudiced by the rulings admitting it".

In numerous instances judgments in favor of plaintiffs in *libel* actions have been reversed for the erroneous reception of evidence of the plaintiff's good reputation in advance of an attack.

See,

Davis v. Hearst, 160 Cal. 143;
McCabe v. Platter, 6 Blackf. (Ind.) 405;
Miles v. Van Horn, 17 Ind. 245 (Ind.);
Kovacs v. Mayoras, 175 Mich. 582; 141 N. W. 662;
Kennedy v. Holladay, 25 Mo. App. 503;
Shipman v. Burrows, 1 Hall. (N. Y.) 399;
Blakeslee v. Hughes, 50 Ohio State 490; 34 N. E. 793;
Cooper v. Phipps, 24 Ore. 357; 33 Pac. 985;
Chubb v. Gsell, 34 Pa. 114;
Hall v. Elgin Dairy Co., 15 Wash. 542; 46 Pac. 1049.

In all of the foregoing cases, evidence of the good reputation of a plaintiff in a *libel action* (in which necessarily character was in issue) was held inadmissible in advance of an attack, and judgments in favor of the plaintiff were reversed for the reception of such evidence. As we have already stated, the reason for the exclusion of such evidence is a practical one. A

plaintiff who becomes a witness in his own case after having his reputation for "truth and veracity" vouched for by other people, secures an advantage over his adversary that cannot be measured. His testimony is given under a favorable atmosphere, that cannot but cause it to be measured by different standards than those by which the testimony of the other witnesses is measured.

Again, the only issue upon which proof of the party's good reputation in a libel action can legitimately bear is that of damages. But in a case where the defendant pleads justification or mitigation, it has been the practical experience of courts that a jury will consider proof of good reputation, not for the legitimate purpose for which it is introduced, but for the illegitimate and unlawful purpose of determining the truth of the charge and the motive of the defendant in publishing the charge. Evidence of good reputation of a party in a civil action is never admitted for the purpose of showing that the party was not guilty of the acts with which he is charged. But invariably juries consider such evidence when admitted as proof that a party did not and would not commit the acts charged against him in the alleged libelous article. It is because illegitimate use is made of such evidence by a jury that courts exclude it.

Unless the defendants impeach the good reputation of the plaintiff in a libel action or in any other action involving character, the plaintiff must stand upon the presumption of good character which the law affords. It is only when the defendant seeks to impeach the good

character of the plaintiff by direct evidence that the plaintiff may in rebuttal of such evidence introduce evidence of his good character. If by his pleadings and his proofs the defendant shows a disinclination to attack the reputation of the plaintiff, and as said in *Blakeslee v. Hughes,* supra, "expressly declines that issue", it is not fair to the defendant that the minds of the jury should be saturated with evidence that can be of no assistance to them but will inevitably bias and prejudice them against the defendant and render it difficult or impossible for them to calmly and dispassionately view the evidence introduced by the defendant in support of his pleas of justification and mitigation.

In the present case the defendants at no time sought to impeach the character or reputation of the plaintiff, either as a man or as an engineer. The reception of evidence of the plaintiff's good reputation therefore was prejudicially erroneous.

1. Evidence of the Plaintiff's Good Reputation Was Not Admissible as Tending to Show the Standing of the Plaintiff in His Profession.

In the trial court counsel for the plaintiff took the position, in opposing a petition for a new trial, that evidence of the plaintiff's good reputation was admissible as tending to show his high standing in his profession.

The position of counsel was that the evidence admitted called not for the reputation of the plaintiff as a man but for the reputation of the plaintiff "for the

truth and veracity of his reports as a consulting engineer", and therefore called for his *professional* standing as distinct from his *personal* standing. To this there are three answers: (1) the question is susceptible of no such construction; (2) evidence of the professional standing of the plaintiff was inadmissible under the pleadings, and (3) even though plaintiff's professional standing were in issue, he could not prove it by evidence of good reputation, in advance of an attack by the defendants. These propositions we will discuss in their order.

(a) *The evidence of good reputation in its nature could refer only to the "personal" as distinguished from the "professional" standing of the plaintiff.*

The question objected to called for the "general reputation of Taggart Aston in the engineering world, meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this county and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer (R. p. 179). To this question the witness answered "from all the information that I have been able to secure concerning Mr. Aston both in America and in Europe his reputation has been first-class" (R. p. 180).

It is hardly debatable that a question that asks for the reputation of an engineer for the *truth* and *veracity* of his reports calls for *personal* as distinguished from *professional* qualifications. A poor engineer may make

honest and truthful reports; conversely an efficient engineer may make dishonest and untruthful reports. The truth or the honesty of the reports can in nowise reflect the ability of the engineer making them. Truth, honesty or veracity of a person, whether he be a lawyer, a doctor or an engineer, are attributes that reflect upon him as a man, and therefore in a personal, not in a professional capacity. A question which calls for the reputation of a man for the "truth and veracity of his reports as a consulting engineer" does not in anywise or to any extent indicate the standing of an engineer in his profession; it merely calls for his reputation as a truthful and veracious man. Such evidence, therefore, was not admissible as tending to show the position and standing of the plaintiff in his profession. It does not in anywise tend to show the position or standing of the plaintiff in his profession. It is inherently limited to showing the reputation of the plaintiff for certain personal attributes common to all honest men, whether they be engineers or members of some other calling or profession.

The plaintiff in the present case was permitted, without objection, to testify to his technical education[34] and to the positions and the projects[35] with which he had been connected throughout his professional career. This evidence was allowed upon the theory that it tended to show the plaintiff's position in the world, under the rule laid down in *Turner v. Hearst,* 115 Cal. 394, and kindred cases. But as we have already pointed

---

[34] R., pp. 172, 173.
[35] R., pp. 173, 174.

out, the evidence which is here the subject of consideration did not tend to show plaintiff's position in the world except by proof of reputation for certain personal attributes in nowise connected with his profession, and as we have already shown, proof of a good reputation for such personal attributes cannot be made by a plaintiff in advance of an attack by defendants.

(b) *Evidence of the plaintiff's position and standing in his profession was inadmissible under the pleadings.*

Plaintiff's position is that the evidence which is here the subject of consideration is admissible as tending to show his position in his profession, on the theory that the damage to the plaintiff in his profession would bear a direct ratio to the standing of the plaintiff in his profession. But the plaintiff, under the issues in the case, *was not entitled to any damage for injury to his profession.*

A plaintiff in a libel action may recover damages for injury to his occupation, business or profession in two cases only: (1) Where the libel reflects upon the plaintiff *in relation to his business, occupation or profession,* in which event the plaintiff may recover damages to his business, occupation or profession *without special pleading or proof of such damage;* and (2) Where a libel affects the plaintiff not in relation to his business, occupation or profession, but solely in a personal capacity, in which case the plaintiff may recover damages for injury to his business, occupation or profession, *but only where he specially pleads and proves*

such damage. In the first case, the libel directly attacks and directly affects the plaintiff in his occupation, and is held libelous *per se.* In the second case, the plaintiff is affected in his occupation indirectly, if at all, and the article is *not* libelous *per se;* he must therefore plead damage specially and prove it, as in all cases of alleged libels which are not libelous *per se.*

In some cases a libel may be aimed at a personal and a professional qualification of the plaintiff at the same time. A libel which in terms charges a lawyer with being dishonest, affects the subject of the libel both as a lawyer and as a man. It is libelous per se in both aspects. Accordingly, in such case the plaintiff may, *without special plea or proof,* recover damages that flow naturally from the libels (a) upon the plaintiff *as a man,* and (b) upon the plaintiff *as a lawyer.* It is obvious that in such a case the plaintiff being entitled to damages for injury to his profession, has a right to show the nature of the injury to his profession, and incidentally his standing in his profession. Such a case was *Turner v. Hearst,* 115 Cal. 394. In that case the plaintiff was an attorney. The complaint in the action was predicated upon a libel in a twofold capacity, to wit, upon the plaintiff (a) as an individual, and (b) as an attorney. The article complained of charged the plaintiff with dishonesty. The allegation of the complaint was that the defendant had published "of and concerning the plaintiff and of and concerning him in his capacity as an attorney at law" a certain libelous article. On the trial, evidence was admitted as to the extent of Turner's professional practice. With respect

to the admission of this evidence the court (speaking through Mr. Justice Henshaw, the same justice who wrote the opinion in *Davis v. Hearst*) said (p. 399):

> "It was not error for the court to allow proof of the extent of plaintiff's practice. Plaintiff was a lawyer engaged in the practice of his profession. The words of the publication being admittedly libelous per se, and affecting plaintiff's standing in his profession, it was proper for the jury, in estimating the general damages to which plaintiff was thus entitled, to know his position and standing in society, and the nature and extent of his professional practice. General damages, in an action where the words are libelous per se, are such as compensate for the natural and probable consequences of the libel, and certainly a natural and probable consequence of such a charge against a lawyer would be to injure him in his professional standing and practice."

This does not mean that proof of injury to occupation or profession may be given in every case of a libel which is libelous per se. It means that such evidence may be given where the libel is libelous per se *as affecting the plaintiff in his occupation or profession.* If a libel, even though libelous per se, reflects upon a plaintiff only in his personal capacity, evidence of injury to business or occupation can only be given where there has been a special plea of damage. In other words, injury to occupation or profession is included within the general class of damage which may be proved without special plea only where the libel is in terms aimed at the plaintiff in his business or professional capacity. The courts have at all times marked a distinction between libels which affect a person personally and those which affect him professionally.

See,

Harkness v. Chicago Daily News, 102 Ill. App. 162.

In this case a newspaper article was directed at the place of business of the plaintiff, and stated that said place of business was unsanitary and that people had become sick therein. The plaintiff charged in his complaint that this libel was "published of and concerning the plaintiff". The court held that

> "the plain reading of the declaration shows that this alleged libel is of and concerning the business of the plaintiff, that is, of the healthfulness of the goods made and sold by her".

But, as the court pointed out:

> "it is nowhere alleged that the libel is published of and concerning her business, trade or occupation";

and commenting thereon the court said:

> "Here is lacking an indispensable element of good pleading, for want of which the demurrer must be sustained."

See, also,

McDermott v. Union Credit Co., 76 Minn. 84; 78 N. W. 967, wherein it is said (p. 968):

> "It is possible that anything published in disparagement, however slight, of a person as an individual may incidentally affect him somewhat in his business or profession; but it does not necessarily follow that the words are actionable, per se, as published of and concerning him in relation to his profession or business. Any such rule would open the door for a flood of vexatious litigagation. To be actionable on that ground alone, the publication must be such as would naturally and directly affect him prejudicially in his profession or business."

Nowhere in the article complained of in the present case is there any statement, intimation or suggestion

that the plaintiff was an engineer or anything that linked the plaintiff's profession with the statements made concerning the plaintiff. The plain import of the article complained of is that the statements were made of the plaintiff personally and not in his capacity as an engineer. So, too, the complaint in the present case in terms alleges that the libel was published "of and concerning the plaintiff" (R. p. 55). So that not only does the language of the article not admit of a construction that it was aimed at the plaintiff as an engineer, but the plaintiff in his complaint expressly limits the libel as one aimed at him personally. Nowhere in the complaint is there any allegation of *special damage* to the plaintiff's profession, and upon the trial there was no proof of any damage to the plaintiff's profession. We say, therefore, that the plaintiff was not entitled to damages for injury to his profession, and consequently was not entitled to put in proof of his standing in his profession.

See,

Smedley v. Soule, 125 Mich. 192; 84 N. W. 63.

The case just cited may be said to be a leading case upon this subject. Its holdings are correctly summarized in the syllabi as follows (p. 65):

> "In an action for libel, plaintiff, in order to recover for damages in his profession must, in his declaration, connect the libel by the proper colloquium with his profession, and allege special damages.
>
> "Where no loss of business is shown, no damage can be recovered for injury to one's profession."

In the opinion it is said:

> "It is common in all actions for libel and slander for the plaintiff to allege not only his good name, etc., as a citizen, but also to allege his business or profession. And the mere fact that such occupation or business is stated in the declaration is not sufficient to justify the inference that the libelous or slanderous article was uttered with reference to his particular business or profession, especially in the absence of any allegation that he has suffered pecuniary loss in his profession or business, but has only suffered loss in his good name, fame, and credit. What is there in such a declaration to notify a defendant that plaintiff claims injury to his profession or business, or that he would show pecuniary loss without alleging any, or that a jury should be turned loose in a realm of speculation to guess what loss in that direction plaintiff has sustained. * * * All charges of disreputable or criminal conduct tend to injure every man in his profession, trade, or occupation; but the law does not permit recovery therefor unless the words be spoken of him in regard to such profession, trade, or occupation, and loss is alleged and proved. Every such plaintiff can recover for injury to feelings and damage to his reputation. If he desires to go beyond this, it is a wholesome rule to require him to connect the libelous charge by the proper colloquium with such profession, trade, or occupation, and to allege special damages."

See, also,

Stewart v. Codrington, 55 Fla. 327; 45 So. 809.

This case involved a newspaper article, libelous per se upon the plaintiff individually. It was held that for the injury suffered by him as an individual the plaintiff was entitled to damages without special plea or proof. But in the absence of special plea and proof the plaintiff could not recover damages for injury to his profession, there being no allegation in the complaint to show that the article was published concerning the

plaintiff in his professional capacity. The court says (p. 812):

> "This court has held that in libel any language published of a person that tends to degrade him, or bring him into ill repute, or to destroy the confidence of his neighbors in his integrity, or to cause other like injury, is actionable per se, and that in such cases it is not necessary to allege special damages. * * *
>
> "It is true, as contended, that there is no allegation in any count that the libelous matter was published of and concerning the plaintiff in his office as the judge of the criminal court of record, or as a solicitor or attorney, and we think such allegations are necessary in order to entitle the plaintiff to prove that he was libeled in such office or business. Saunders on Pl. & Ev. 915; Newell on Slander and Libel (2d Ed.) 700. He will be confined, therefore, to such damages as he may be able to prove he has sustained in his private character, outside of these considerations (13 Ency. Pl. & Pr. 38), as the declaration is broad enough to cover any such possible damages."

As bearing upon the question herein involved and showing that a plaintiff is not entitled to general damages for injury to professional business without allegation and proof that the libel was aimed at him in a business or professional as distinguished from an individual capacity, see the following cases:

Van Epps v. Jones, 50 Ga. 238;

Gilbert v. Field, 3 Caines (N. Y.) 329;

Barnes v. Trundy, 31 Me. 321;

Line v. Spies, 139 Mich. 484; 102 N. W. 993;

Sherin v. Eastwood, 27 So. Dakota 312; 131 N. W. 287;

Jones v. Bush, 131 Ga. 421; 62 S. E. 279;
Lewis v. Weidenfeller, 175 Mich. 296; 141 N. W. 649.

(c) *Even though the plaintiff were entitled under the pleadings to recover damages for injury to his profession, nevertheless he was not entitled to prove professional reputation in advance of an attack.*

Even though the plaintiff were entitled to recover damages for injury in his profession without special pleading or proof of such injury, nevertheless he was not entitled to prove his good professional reputation in advance of an attack by the defendant. In fact the rule which excludes evidence of good reputation of a plaintiff in a libel action until such reputation has been impeached by the defendants is not limited to *personal* reputation but extends to *professional* reputation as well.

See,

Burkhart v. North American Co., 214 Pa. 39; 63 Atl. 410.

This was a libel action in which evidence of the high professional reputation of the plaintiff as a musician was rejected and error was predicated upon the rejection of such evidence. In disposing of the assignment of error based upon this ground, the court said (p. 411):

"The first four assignments of error are to the rejection by the learned judge at the trial of offers to show the

> high professional reputation of the plaintiff as a musician. All the cases agree on the general rule that such evidence is not admissible until his reputation has been attacked."

To the same effect, see,

Howland v. Geo. F. Blake Mfg. Co., 156 Mass. 543; 31 N. E. 656,

where evidence of the plaintiff's business reputation was excluded in the trial court and the ruling affirmed on appeal.

It is true that in this case evidence of plaintiff's standing in his profession might be admissible to establish the measure of damages, but the plaintiff's standing and the damage suffered must be specially pleaded and proved, the allegation detailing, for example, the important work in which plaintiff had been engaged and the loss of clientele which he had suffered. But evidence of a plaintiff's *general professional reputation* is too vague, and moreover is inadmissible in advance of an attack upon it for the even more important reason that it would tend to the same abuses which have prompted courts to exclude evidence of a plaintiff's *general private reputation.* It is impossible to measure the weight which a jury might attach to general evidence of good standing, and courts reject it because of the dangerous influence such evidence might have upon a jury's determination, not alone of the damages but of the truth of the charge against the plaintiff. A jury might accept this evidence (although in advance of an attack upon

the plaintiff's reputation) to convince them that a person of such general professional reputation could not have been guilty of the acts charged against him. It is to obviate this danger of a jury's summary conclusion that courts reject altogether the arbitrary conclusion of a witness concerning the plaintiff's general standing in his profession, before it has been attacked.

In concluding this branch of the case, our position may be briefly summarized as follows:

(1) The evidence of plaintiff's good reputation "for the truth and veracity of his reports" admitted by the trial court in its nature concerned the plaintiff's *personal* as distinguished from his *professional* reputation and was inadmissible because the plaintiff's reputation was not attacked by the defendants;

(2) If it be claimed that the evidence of plaintiff's good reputation admitted by the trial court dealt with his professional reputation as distinguished from his personal reputation, such evidence was inadmissible for two reasons: (a) Under the pleadings the article complained of, not being a libel upon the plaintiff professionally, the plaintiff could not recover any damages for injury to his profession without a special plea and proof of such damages; and (b) Even though the plaintiff were entitled to recover damages for injury to his profession, nevertheless evidence of good *professional* reputation was not admissible in advance of an attack.

B. THE COURT ERRED IN ADMITTING IN EVIDENCE ARTICLES THAT APPEARED IN VARIOUS NEWSPAPERS THROUGHOUT THE UNITED STATES ON JULY 7 AND JULY 8, 1913, AND CONTAINED EUGENE J. SULLIVAN'S CHARGES OF POLITICAL BIAS AGAINST SAN FRANCISCO'S ENGINEERS IN THE HETCH-HETCHY MATTER AND OF THE SUPPRESSION OF THE BARTELL REPORT.

Over the objection of the defendants, the court admitted in evidence copies of (a) the Arizona Gazette of July 7, 1913; (b) the Evening World-Herald of Omaha, Nebraska, of July 7, 1913; and (c) the Herald-Republican of Salt Lake City, of July 8, 1913. All of these papers contained articles setting forth the charges of political chicanery, bias and suppression of the Bartell report which were made by Eugene J. Sullivan, President of the Sierra Blue Lakes Water and Power Company, in his testimony on July 7, 1913, before the Committee on Public Lands of the House of Representatives. The reception of these articles in evidence is the basis of Exceptions 42, 43 and 44, and is dealt with in Assignments of Error Nos. 34 to 36, inclusive, hereinbefore set forth.

It is difficult to perceive the theory upon which this evidence was received. The fact that Eugene J. Sullivan in July, 1913, made against the City Engineer of San Francisco and other public officials charges of political bias and chicanery and suppression of evidence could in no degree tend to prove that the newspaper article published six months later, on December 2, 1913, was either false or libelous. It could in no wise tend to prove that the plaintiff had been damaged. In short, the evidence had no legitimate bearing upon any issue

in the case. The fact that for six months prior to the time that the defendants took him to task for his careless statements of political bias and chicanery and suppression of evidence Sullivan had been making such statements in no wise tended to illuminate the minds of the jury with respect to any of the matters involved on the trial. The evidence, however, did have an illegitimate purpose, which it probably served. The plaintiff, by showing that the charges made by Sullivan in July, 1913, were published throughout the United States sought to persuade the jury to believe that the alleged libelous article of December 2, 1913, had circulated in the same places and that thereby the damages of the plaintiff were enhanced. By proving that Sullivan's charges made in July, 1913, were matters of great notoriety, the plaintiff sought to make the jury believe that the alleged libel upon which the action was brought was a matter of equal notoriety. By proving that the charges made by Sullivan had created great public interest in many places in the United States, the plaintiff sought to arouse the belief that the alleged libelous article had aroused a similar interest in the same places. In this manner, the plaintiff covertly attempted to influence the jury and to enhance his damages.

The defendants, of course, were in no wise bound by publications in other newspapers six months before the publication made by the plaintiff. The defendants were not at all responsible for the publications made in other newspapers in July, 1913, and, in addition, the publications of July, 1913, were the self-serving declarations of Sullivan himself, which could in no wise bind

the defendants. It surely could not be claimed that because Sullivan as early as July, 1913, had made charges of the suppression of the Bartell report and of political bias of the engineers of San Francisco in favor of Hetch Hetchy, these charges published in the public press were evidence of these facts.

Had the publications in other papers occurred *after* the article of December 2, 1913, which is the subject of this action, they would not have been admissible because not the direct and proximate result of that publication.

See:

Carpenter v. Ashley (1906), 148 Cal. 422; 83 Pac. 444;

McDuff v. Detroit Evening Journal Co. (1890), 84 Mich. 1; 47 N. W. 671; 22 Am. St. R. 693;

Clark v. North American Co. (1902), 203 Pa. 346; 53 Atl. 237.

McDuff v. Detroit Evening Journal Co., supra, was a libel action.

The trial court admitted in evidence a copy of the Omaha Journal in which was an editorial containing many of the charges which were the subject of the suit. The plaintiff had received a copy of the Omaha Journal in a letter from his brother. The letter was received in evidence in connection with the paper itself. Subsequently both were stricken out upon motion of the defendant. In holding that the original reception of the evidence was error, and that such error was not cured

by the subsequent striking out of the evidence, the court says:

> "Plaintiff showed no connection between the publication in the Journal and the article in the Omaha Herald, which appeared under the editorial column of that paper, and not as a piece of news obtained from another publication. That article and the letter were clearly inadmissible. The jury very likely presumed that the article in the Omaha Herald was based upon the article in the Journal, but there was no evidence of the fact. Error in admitting such testimony is not cured by striking it out. There may be cases where courts may well say that the jury could not be prejudiced by the admission of incompetent testimony when it is stricken out. In such case it would be error without prejudice, and judgment would not be reversed for that reason. But we cannot apply such ruling to the present case, where the inevitable result of the evidence would be so injurious to defendant."

In *Clark v. North American Co.,* supra, it was held that accounts of the same transaction in other newspapers were inadmissible in a libel action against a newspaper publisher. The court said:

> "All the assignments in reference to the accounts of the same transaction in other newspapers are sustained. Such accounts were not admissible in evidence for any purpose."

See also *Bigley v. The National Fidelity & Casualty Co.,* 94 Neb. 813; 144 N. W. 810. In this case it was held to be erroneous to receive in evidence in a libel action independent publications in other newspapers.

A fortiori, publications six months *before* the date of an alleged libelous article are inadmissible for any purpose.

The evidence, as we have before pointed out, had no legitimate bearing upon any issue involved in the case. It was calculated, however, to play an illegitimate purpose and to lead the jury to believe that the article complained of containing charges against the plaintiff had circulated to the same extent and in the same places as the articles containing Sullivan's charges published six months before. This, however, is neither a fair nor a reasonable inference. To what extent this evidence affected the jury in their deliberations we, of course, cannot determine. It was introduced by the plaintiff for the purpose of affecting the jury and, no doubt, did affect them. It was calculated to show a wide circulation of the alleged libelous article by unfair and unreasonable inferences and thereby to enhance the damages of the plaintiff. We submit that its reception was clearly erroneous and prejudicial.

C. EVIDENCE WAS ERRONEOUSLY ADMITTED THAT A REPORT MADE BY THE WITNESS GRUNSKY ON THE RUN-OFF FROM ALAMEDA CREEK HAD BEEN TURNED IN LATE TO THE BOARD OF ARMY ENGINEERS.

In their letters and telegrams to Congress, the plaintiff and Sullivan claimed that a report prepared by Assistant City Engineer Bartell had not been delivered to the Board of Army Engineers. It was their contention that such report was not delivered for the reason that it was favorable to the contentions of the Sierra Blue Lakes Water and Power Company and showed that the Hetch Hetchy rights sought by San Francisco were unnecessary.

This was the only report claimed by the plaintiff or by Sullivan in their letters and telegrams to Congress to have been suppressed. Upon the alleged suppression of this report alone did the plaintiff and Sullivan rest their charge of public scandal in the suppression of reports.[36] Because of the charge of the suppression of this report alone did the defendants accuse the plaintiff and Sullivan of having made gross and careless aspersions upon the City Engineer. Yet, upon the trial the plaintiff, over the objection of the defendants, was permitted to prove that a report made by the witness Grunsky on the run-off of Alameda Creek was not turned in to the Board of Army Engineers until October or November, 1912.[37]

The admission of this evidence forms the basis of Exceptions 48 and 49, and is dealt with in Assignments of Error Nos. 38 and 39, hereinbefore set forth.

This report had no bearing at all upon the Mokelumne River source of supply or upon the properties of the Sierra Blue Lakes Water and Power Company. It had nothing to do with the charges made by the plaintiff of suppression of reports. It was made by Mr. Grunsky at the request of Mr. Freeman and was addressed to Mr. Freeman.[38] It was for his information, in connection with his work, and was probably a check upon the claims made by the Spring Valley Water Company as to the amount of water available in Alameda Creek. In fact, Mr. Freeman was of the opinion that the claims of the Spring Valley Water Company with

---

[36] R., p. 126.
[37] R., p. 370.
[38] R., p. 369.

respect to the total output of water at this source was exaggerated,[39] and had Mr. Grunsky, in connection with other engineers, make a report. The report, as it turned out, was not at great variance with the claims of the Spring Valley Water Company.[40] The claims of the latter company and the evidence in support of them were well known to the Board of Army Engineers. In fact that company was represented at Washington in the Hetch Hetchy hearings, and it was upon the suggestion of its counsel that the Grunsky report on Alameda Creek was delivered to the Secretary of the Interior and by the latter to the Board of Army Engineers.[41]

The only effect, therefore, of the evidence that a report made by Mr. Grunsky, not at great variance with the data already before the Board of Army Engineers, was not delivered to that board, was to prejudice the jury and make them believe that the city was actually suppressing evidence. At the time of the trial Mr. Freeman was at his home in Providence, Rhode Island.[42] No suggestion had been made prior to the trial that any report other than the Bartell report had been suppressed. The complaint alleged in terms the suppression of the Bartell report[43] but contained no allegation of the suppression of any other report.

Upon the close of the trial, in rebuttal, the plaintiff was permitted to show that on November 25, 1912, at the hearing of the order to show cause before the Secretary of the Interior in Washington, Mr. Mc-

[39] R., p. 371.
[40] R., p. 373.
[41] R., p. 385.
[42] R., p. 387.
[43] R., p. 126.

Cutchen, representing the Spring Valley Water Company, had complained to the Secretary of the Interior that a report on the Alameda Creek had been made by Mr. Grunsky and that he had never been permitted access to it; that the Secretary of the Interior asked Mr. Freeman if there was such a report, and the latter then handed over the report, saying that it was the only copy he had but that he was willing to turn it over to the Secretary of the Interior and to the Board of Army Engineers.[44]

As above stated, no intimation was contained in anything that transpired prior to the commencement of the action, or in anything in the complaint, that a claim would be made of the suppression of a report other than the Bartell report. At the time of the trial, Mr. Freeman, who alone could have explained the reasons why the report on the Alameda Creek was not delivered to the Board of Army Engineers, was at his home in Providence, Rhode Island.[45]. The last testimony, therefore, that went before the jury had to do with the alleged suppression of a second report as to which there was no intimation or suggestion in the pleadings or in statements prior to the action. The obvious purpose of this testimony was to bias and prejudice the jury and make them believe that the charges of political bias and chicanery and suppression of evidence made by Sullivan and the plaintiff were true.

The only charge in the article complained of to which this evidence could be claimed to be at all re-

[44] R., p. 386.
[45] R., p. 387.

sponsive was the charge that the plaintiff had made gross and careless aspersions upon the City Engineer, but this arraignment of the plaintiff, as we have already shown, was the outgrowth of his charge that the Bartell report had been suppressed. It was not based upon any other charge of suppression. In fact, the plaintiff had never made any other charge of suppression. If the Hyde-Marx-Grunsky report on Alameda Creek had been suppressed, that circumstance would in no degree tend to prove that the Bartell report had been suppressed, nor would it illumine the motive of the plaintiff in his charge that the Bartell report had been suppressed. There is no evidence in the record to show that, at any time while they were making the charges of suppression of evidence and of political bias and chicanery, Sullivan or the plaintiff knew of the existence of the Hyde-Marx-Grunsky report or of the fact that it had been delivered late to the Board of Army Engineers. Without proof of the fact that the plaintiff knew of the existence and late delivery of the Hyde-Marx-Grunsky report at the time he made the charges of the suppression of the Bartell report and that he was influenced in making the charge of suppression of the latter report by reason of his knowledge of the existence and alleged suppression of the former, evidence of such alleged suppression was inadmissible for any purpose.

The only issue between the plaintiff and the defendants growing out of the suppression of any reports was whether the plaintiff had made gross and careless aspersions upon the City Engineer in charging the sup-

pression of the Bartell report. If the plaintiff was grossly negligent in charging the suppression of the Bartell report it would not avail him to prove that another report had been suppressed. If, at the time he made the charge of the suppression of the Bartell report, the plaintiff knew of the suppression of another report, it might be claimed that the fact of the suppression of the latter report *coupled with the plaintiff's knowledge of its suppression* would tend to prove the good faith of the plaintiff in making the charge of the suppression of the Bartell report and would be some evidence in reply to the charge that he had grossly and carelessly made aspersions upon the City Engineer in charging the suppression of the Bartell report. But, in the absence of any evidence that the plaintiff knew of the existence of the Hyde-Marx-Grunsky report or of its alleged suppression at the time that he made his charges of the suppression of the Bartell report, such evidence was utterly inadmissible.

The defendants had charged the plaintiff with making "gross and careless aspersions" upon the City Engineer in charging the suppression of the Bartell report. The plaintiff was entitled to disprove this charge by evidence that the charge was reasonably made after investigation and in good faith; but the fact that another report, of the existence of which the plaintiff was ignorant at the time, had been suppressed, if such were the fact, would in no wise tend to show that the plaintiff had acted in good faith or upon reasonable grounds in charging the suppression of the Bartell report.

Again, as we have already pointed out, Mr. Freeman, who alone could explain the reasons why the Grunsky report on Alameda Creek was not delivered to the Board of Army Engineers, was in Providence, Rhode Island,[46] at the time when the charge was first made that this report had been suppressed. We do know from Mr. Grunsky that the report did not differ materially from the claims of the Spring Valley Water Company, with which the Board of Army Engineers were familiar.[47] This probably explains why the report was not delivered to the Board of Army Engineers. The report was made, according to Mr. Grunsky, for the enlightenment of Mr. Freeman[48] and as a check upon the claims of the Spring Valley Water Company.[49]

The report having developed the fact that the claims of the Spring Valley Water Company were probably correct, there was no reason why the report should have been delivered to the Board of Army Engineers, but the fact that it was not delivered carried with it the insidious suggestion that there had been a deliberate suppression of evidence and, coming as it did at the close of the case, undoubtedly prejudiced the jury and led them to believe that the charges made by the plaintiff of political chicanery and prejudice of San Francisco's engineers and of their suppression of evidence were correct.

The evidence being inadmissible upon any theory of the plaintiff's case, its reception was erroneous and, for the reasons we have pointed out, was prejudicial.

---

[46] R., p. 387.
[47] R., p. 373.
[48] R., p. 369.
[49] R., p. 371.

D. THE COURT ERRED IN ADMITTING EVIDENCE OF STATEMENTS MADE BY THE PLAINTIFF AT A MEETING OF THE CIVIC CENTER LEAGUE HELD IN THE ST. FRANCIS HOTEL ON NOVEMBER 5, 1913, ALMOST A MONTH BEFORE THE PUBLICATION OF THE ARTICLE COMPLAINED OF.

Upon the trial three witnesses testified that on November 5, 1913, at a meeting of the Civic Center League held in the St. Francis Hotel, San Francisco, the plaintiff made a statement in which he charged the suppression of the Bartell report and charged bias and discrimination on the part of San Francisco's engineers against the properties of the Sierra Blue Lakes Water and Power Company and in favor of the Hetch Hetchy project. These witnesses were Eugene J. Sullivan,[50] Clement H. Miller[51] and the plaintiff himself.[52] The admission of this testimony is the basis of Exceptions Nos. 9, 10, 11, 25, 33, 35 and 36, and is dealt with in Assignments of Error Nos. 5, 6, 7, 20, 25, 27 and 28.

In addition to and in connection with the evidence thus erroneously admitted the court admitted in evidence over the defendants' objections a copy of the San Francisco Examiner of November 6, 1913,[53] which purported to give an account of the proceedings of the Civic Center meeting of November 5, 1913. The purpose of the latter evidence was to show that the plaintiff was not mentioned in the Examiner article, nor were any of his statements reported. The admission of the latter evidence forms the basis of Exception No. 34, and is dealt with in Assignment of Error No. 26.

---

[50] R., p. 165.
[51] R., p. 182.
[52] R., p. 263.
[53] R., p. 259.

We submit that this evidence was erroneously admitted.

In discussing the question, we shall first deal with the statements made by the plaintiff at the meeting, and secondly with the Examiner's report of the proceedings at the meeting.

(1) Evidence of the statements made by the plaintiff at the Civic Center League meeting of November 5, 1913, was not admissible.

As we have frequently pointed out, the issue between the plaintiff and the defendants was as to the truth of the charge that the plaintiff had made gross and careless aspersions upon the engineers representing San Francisco in the Hetch Hetchy matter. Any evidence tending to prove either the truth or the falsity of this charge was admissible. Unless the evidence tended to prove either the truth or the falsity of such charge it was inadmissible.

Upon what theory could the plaintiff prove that a month before the publication of the articles of which he complained he had reiterated the charges that he had been making since the preceding June? The fact that the plaintiff during all of the time between June and November was reiterating his charges of suppression of evidence and of political bias against the engineers representing San Francisco would not tend to prove the good faith of the plaintiff in making the charges, nor would it tend in any degree, however remote, to prove the charges. The self-serving declarations of the plaintiff at the Civic Center meeting of

November 5, 1913, could not prove either the good faith of the plaintiff or the truth of the statements which he made.

The theory of counsel for the plaintiff on this matter seems to have been that the evidence was admissible because representatives of San Francisco were present, notably the City Attorney[54] and the City Engineer,[55] and they made no reply to the charges made by the plaintiff, save that, in response to the charge that a report made by Mr. Bartell had been suppressed, the City Engineer responded that Mr. Bartell was merely one of one hundred and fifty assistants.[56] But, could the failure of the city officials to reply to a charge made by the plaintiff a month prior to the publication complained of bind the defendants in the present action? The sole matter in issue in this connection was the truth or falsity of the statements made by the defendants in the publication of December 2, 1913. The truth or falsity of such statements could not be determined by the failure of the city officials a month before to reply or answer charges made by the plaintiff. A person cannot make indiscriminate charges against another and, when taken to task for it by a third person, endeavor to sustain his charges by proof that the person against whom they were aimed had ignored them.

The statements made by the plaintiff at the Civic Center meeting were purely self-serving. They illustrated no issue in the present case and served no

[54] R., p. 163.
[55] R., p. 163.
[56] R., pp. 165-166.

legitimate purpose. They were obviously intended to influence the jury by having them draw the inference that the city officials present at the Civic Center meeting had admitted the charges made by the plaintiff, because of their failure to reply to them. Such inference, however, is an illegitimate one and could in nowise answer any question existing, *not between the city officials and the plaintiff,* but *between the plaintiff and the defendants* in the present action. Were the issue between the plaintiff and the City of San Francisco, or its officials, failure of the latter to reply to a charge of the plaintiff, might be some evidence of the truth of the charge. But the silence of the city officials in the face of the plaintiff's charge, would bind them, alone. It would be neither binding nor admissible against anyone else.

(2) The Examiner article of November 6, 1913, which purported to show the proceedings of the Civic Center meeting of the previous day was improperly admitted in evidence.

Having shown that the plaintiff made certain statements at the Civic Center meeting of November 5, 1913, the plaintiff then offered and there was received in evidence an article published in the San Francisco Examiner of November 6, 1913.[57] This article purported to show the proceedings at the Civic Center meeting on the previous day. In it no mention is made of the plaintiff or of the statements made by him. It is because of the failure of the article to mention the

[57] R., p. 259.

plaintiff or to report his statements that counsel for the plaintiff claims that the article was admissible.[58]

Upon what issue in the case, we ask, did this evidence tend to cast light? Surely, not the good faith of the plaintiff, because it was an act of the defendants. Surely, not the truth of the statements made by the plaintiff.

There remains but one other issue upon which it could be claimed to be admissible; that is, the issue of malice. The plaintiff, having charged that the publication complained of was actuated by malice, was entitled to introduce any evidence that legitimately tended to show malice on the part of the defendants.

Was the failure to report the statements made by the plaintiff at the Civic Center meeting any evidence of malice? The plaintiff, according to his testimony, had charged the suppression of the Bartell report. He had charged the City Engineer and other engineers representing San Francisco in the Hetch Hetchy matter with political bias and with having discriminated unjustly in favor of Hetch Hetchy and against other properties. Are the defendants to be charged with malice because they failed or refused to permit their columns to be used for the dissemination of the abusive charges made by the plaintiff? If a person over a course of months makes false charges against city officials, is the failure of a newspaper to publish those charges to be regarded as evidence of malice in a libel action subsequently brought against it for having arraigned the maker of the charges for making such charges?

---

[58] R., p. 258.

The very publication complained of arraigns and takes the plaintiff to task for making the kind of charges that he made at the Civic Center meeting. The defendants in the publication of December 2, 1913, charged the plaintiff with making gross and careless aspersions upon the City Engineer and other engineers representing San Francisco. The plaintiff, having brought suit against the defendants for publishing such an article, now claims that the article was actuated by malice because the defendants throughout the months preceding the publication of the article complained of had failed to permit the use of columns of their newspaper to give currency to the very charges for the making of which they arraigned him in the publication complained of.

The defendants, by charging the plaintiff with making gross and careless aspersions upon the City Engineer and other engineers, sufficiently indicated that they believed his charges to be unjustified and false. Under such circumstances, can their failure to publish and give currency to his charges be held to be evidence of malice? We submit that it cannot, and, since this theory is the only possible one upon which the evidence would be admissible, we say that its admission was erroneous.

E. THE COURT ERRED IN ADMITTING TESTIMONY OF THE WITNESS WILLIAM J. WILSEY TO THE EFFECT THAT THE PLAINTIFF WAS IN HIS EMPLOY AND THAT NO REPORTS MADE BY THE PLAINTIFF TO THE WITNESS WERE FOR THE PURPOSE OF SELLING THE PROPERTIES OF THE SIERRA BLUE LAKES WATER AND POWER COMPANY TO SAN FRANCISCO BUT WERE FOR USE EXCLUSIVELY IN SELLING SAID PROPERTIES IN EUROPE, AND THAT THIS FACT WAS KNOWN BY THE PLAINTIFF.

The witness William J. Wilsey, over the objection of the defendants, was permitted to testify that he employed the plaintiff in or about May, 1913, to make an engineering report upon the properties of the Sierra Blue Lakes Water and Power Company in connection with a hydro-electric and irrigation project; and that the plaintiff made two reports—a preliminary and a supplemental report.[59] The witness was further permitted to testify that he had never offered the properties for sale to the City of San Francisco,[60] but that the plaintiff's reports were obtained by him for use exclusively in offering said properties for sale in Europe,[61] and that the properties were offered for sale in Europe;[62] that the plaintiff knew the parties in Europe with whom the witness was negotiating for the sale of said properties,[63] and further knew that said parties were figuring on using the properties for hydro-electric and irrigation purposes.[64]

---

[59] R., p. 176.
[60] R., p. 176.
[61] R., pp. 176-177.
[62] R., p. 177.
[63] R., p. 178.
[64] R., p. 178.

The reception of this evidence is the basis of Exceptions 12 to 20, inclusive, and is dealt with in Assignments of Error Nos. 8 to 16, inclusive.

We submit that this evidence was inadmissible. The charge that the plaintiff and Sullivan were engaged in a scheme to deprive San Francisco of its Hetch-Hetchy privileges with the object and purpose of compelling it to purchase the properties of the Sierra Blue Lakes Water and Power Company could not be answered by evidence that the witness Wilsey was not engaged in such a scheme. The motives of Wilsey and his purposes or intentions with reference to the properties of the Sierra Blue Lakes Water and Power Company are utterly immaterial. The record shows that the plaintiff and Sullivan were doing their utmost to defeat a grant by Congress to San Francisco of privileges in the Hetch Hetchy Valley. The record further shows that they were doing this with the knowledge that, if successful, San Francisco would probably be compelled to purchase the properties of the Sierra Blue Lakes Water and Power Company as the next best source of supply.[64a] In fact it was the *avowed* purpose of Sullivan to defeat the Hetch Hetchy privileges so that his properties might be sold to San Francisco.[65] During all of the time that the campaign against the Hetch Hetchy privileges was being waged in Congress by the plaintiff and by Sullivan *they both knew that the option for the sale of the properties executed to Wilsey was for but three months.*[66] What Wilsey would or might have done

[64a] R., p. 269.
[65] R., pp. 155-156.
[66] R., p. 244.

with the properties had he purchased them could throw no light upon the purpose of the plaintiff and of Sullivan, who knew that Wilsey's option was but for three months, and probably proceeded upon the theory that the option would not be exercised.

It was proper for the plaintiff to testify directly as to what he intended to do with the properties and what his object and purpose was in making his representations to Congress. It was not legitimate or proper for the plaintiff to show *his* motives and purposes *by proof of the motives and purposes of Wilsey.* We submit that the evidence was clearly inadmissible.

F. THE COURT ERRED IN ADMITTING EVIDENCE OF THE AMOUNT OF MONEY EXPENDED ON THE PROPERTIES OF THE SIERRA BLUE LAKES WATER AND POWER COMPANY AND OF THE FACT THAT THAT COMPANY HAD GIVEN OPTIONS FOR THE PURCHASE OF ITS PROPERTIES, FOR WHICH A CONSIDERABLE CONSIDERATION HAD BEEN PAID.

During the examination of the witness Eugene J. Sullivan, President of the Sierra Blue Lakes Water and Power Company, the court, over the objection of the defendants, permitted the witness to testify that he had expended on the company's water properties in construction and in other works about $100,000;[67] that he considered that it was necessary to obtain such moneys from time to time in order that the properties be maintained for the bondholders and stockholders of the company;[68] that he considered the properties of suffi-

[67] R., p. 153.
[68] R., p. 153.

cient value to justify the payment of heavy interest charges and the making of heavy sacrifices in order to preserve them.[69] The witness further testified that during the time he was president of the company options had been given for the purchase of the properties for which a considerable consideration was paid.[70] The reception of this evidence forms the basis of Exceptions Numbers 3 to 6, inclusive, and is dealt with in Assignments of Error Nos. 1 to 4, inclusive.

We submit that such evidence was inadmissible. The fact that the witness had expended the sum of $100,000 to conserve the properties of the Sierra Blue Lakes Water and Power Company did not illustrate any issue in the case; nor did the fact that he felt the properties to be of sufficient value to justify the making of great sacrifices, or the payment of heavy interest charges, tend to prove any issue in the case. Surely the fact that the witness had expended the sum of $100,000 on the properties of the company did not prove or tend to prove the falsity of the charge that Sullivan was engaged in a "scheme" which the article complained of had charged as a gross fraud, to wit, the "scheme" of depriving San Francisco of Hetch Hetchy rights in order that she would be compelled to purchase the properties of the Sierra Blue Lakes Water and Power Company.

The evidence shows that while the witness and the Sierra Blue Lakes Water and Power Company were willing to sell their properties to private individuals

[69] R., pp. 153-154.
[70] R., p. 154.

for $1,500,000[71] they were endeavoring to defeat the Hetch Hetchy privileges sought by San Francisco, thereby compelling San Francisco to purchase their properties, which they were offering to San Francisco for $6,000,000.[72] The evidence shows, therefore, that while Eugene J. Sullivan and his company were willing to sell their properties to private individuals for $1,500,000 they were not only holding the price to San Francisco *at four times that sum* but were endeavoring to *compel* San Francisco to purchase the properties by defeating the grant of the alternative rights in the Hetch Hetchy Valley.

We submit that the evidence of the amount of money expended by Sullivan upon the properties of the Sierra Blue Lakes Water and Power Company, and the fact that he considered the properties of sufficient value to make such expenditure, and had received considerable sums for options upon the properties was not relevant to any matter in controversy and should have been excluded.

G. THE COURT, AS AGAINST THE DEFENDANT WILLIAM RANDOLPH HEARST, ERRED IN ADMITTING IN EVIDENCE COPIES OF THE SAN FRANCISCO EXAMINER OF NOVEMBER 30, 1913, AND DECEMBER 1, 1913, WITH RESPECT TO THE PROPOSED WASHINGTON EDITION OF SAID SAN FRANCISCO EXAMINER.

The court admitted in evidence copies of the San Francisco Examiner of November 30 and December 1, 1913, in each of which statements were made concern-

[71] R., p. 269.
[72] R., p. 269.

ing the proposed Washington edition of that paper to be published on December 2, 1913. Among other things it was stated in these articles that the special Washington edition would be under the personal supervision of William Randolph Hearst. Similar statements tending to connect Mr. Hearst with the publication of the proposed special edition were also contained in these articles. The admission of this evidence forms the basis of Exceptions Nos. 38, 39 and 40, and is dealt with in Assignments of Error Nos. 30 to 33, inclusive.

The purpose of this evidence was to connect the defendant Hearst with the alleged libelous publication. The theory of the plaintiff, expressed in his complaint, is that the defendant Hearst was the "Managing Editor in charge of"[73] the publication complained of.

There is, however, an utter absence of proof that the defendant Hearst was connected in anywise with the publication. There is no evidence to show that he had anything to do with the publication which is the basis of this action. The statements appearing in the San Francisco Examiner prior to the publication complained of were, therefore, as to him, inadmissible hearsay. The declarations of the owner of the Examiner, to wit, the Examiner Printing Company, would not bind any one but the maker of those statements. As against the defendant Hearst the statements were incompetent, hearsay and inadmissible.

As we stated in the outset of this brief, we are not claiming that the evidence was insufficient to support the verdict. On the part of the defendant Hearst,

[73] R., p. 55.

we could, if so minded, successfully make such claim. Not only is the evidence *insufficient* to justify a verdict against him but there is *no* evidence tending in anywise to connect him with the publication complained of. The fact, however, that a verdict was rendered by the jury against the defendant Hearst in spite of an utter absence of evidence connecting him with the publication complained of, illustrates in a striking way the danger of admitting incompetent or irrelevant evidence and lends point and perspective to the propositions which we have heretofore discussed relative to the admission of other testimony. The only evidence before the jury tending to prove that the defendant Hearst had anything to do with the publication complained of was the inadmissible hearsay of his codefendant contained in articles preceding the publication which is the basis of this action.

Aside from this evidence, as to which there can be no doubt that error was committed in its reception, the record contains nothing that would even, in a remote way, connect the defendant Hearst with the publication of the alleged libelous article. The admission of such evidence is sufficient of itself to warrant a reversal of a judgment against the defendant Hearst. And, as we have already pointed out, the effect of such evidence in bringing about a verdict against the defendant Hearst illustrates the argument which we have been making that the jury were led astray by irrelevant and incompetent testimony, and led to bring in a verdict

which they might not, and probably would not, have brought in if such evidence had been excluded.

H. THE COURT ERRED IN ADMITTING IN EVIDENCE COPIES OF CERTIFICATES FILED WITH THE POST OFFICE AUTHORITIES SHOWING THAT THE DEFENDANT HEARST IS THE ONLY PERSON OWNING MORE THAN ONE PER CENT OF THE STOCK OF VARIOUS NEWSPAPERS IN THE UNITED STATES.

The court admitted in evidence, over the objection of the defendants, certified copies of various certificates filed with the Postmaster General of the United States, in accordance with an Act of Congress, stating the persons owning more than one per cent of the stock of corporations publishing various newspapers. The certificates so admitted showed that the defendant William Randolph Hearst is connected with the following named papers: "The San Francisco Examiner of San Francisco, California", "The Los Angeles Examiner of Los Angeles, California", "The Atlanta Georgian of Atlanta, Georgia", "The Chicago Evening American of Chicago, Illinois", "The Boston American of Boston, Massachusetts", and "The New York Evening Journal of New York, New York".[74] The reception of this evidence forms the basis of Exception No. 47 and is dealt with in Assignment of Error No. 37.

The purpose for which the evidence was offered, as stated by counsel for the plaintiff, was that "it may have some bearing on what I shall desire to do in

[74] R., p. 320.

calling other witnesses to prove the direct connection between the defendant Hearst and this publication''.[75]

As we have already shown, no direct or any connection was shown between the defendant Hearst and the publication complained of. Evidence showing that the defendant Hearst was a stockholder in the defendant corporation in nowise tended to prove that he was directly or even remotely connected with the publication complained of. The newspaper in which the publication was made is owned and operated by a corporation,—The Examiner Printing Company, one of the defendants herein. It need not be argued that that corporation is a legal entity distinct from its stockholders. The mere fact that the defendant Hearst was on owner of stock in the defendant corporation in no way tended to show that he was connected with the publication. The plaintiff recovered judgment against the defendant corporation; necessarily as a stockholder of the defendant corporation the defendant Hearst must bear his proportion of the loss suffered through the payment of any judgment that the plaintiff may recover. But the fact that he is a stockholder, even a heavy stockholder in the defendant corporation does not make him liable upon any theory of original liability. The evidence was offered, as stated by counsel for plaintiff, for the purpose of showing the connection between the defendant Hearst and the publication complained of. It does not in anywise tend to show that fact. We submit that its reception was erroneous and prejudicial, particularly as against the defendant Hearst.

[75] R., p. 319.

IV.

CONCLUSION.

In view of the foregoing considerations we respectfully submit that the judgment herein should be reversed.

Dated, San Francisco,
March....., 1916.

Respectfully submitted,

GARRET W. MCENERNEY,
Attorney for Plaintiffs in Error.

JOHN J. BARRETT,
ANDREW F. BURKE,
Of Counsel.